United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1294

To be Argued by
PAULA VAN METER

BP/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1294

UNITED STATES OF AMERICA ex rel.
CARL M. ROBINSON,

Petitioner-Appellant,

-against-

LEON J. VINCENT, SUPERINTENDENT
GREEN HAVEN CORRECTIONAL FACILITY
STORMVILLE, NEW YORK

Respondent-Appellee

BRIEF FOR PETITIONER-APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

Petitioner-appellant, Carl M. Robinson, appeals pursuant to 28 U.S.C. §2253, from the Order of the United States District Court for the Southern District of New York (Cooper, J.) dated January 31, 1974, (R. 22)* denying his application for writ of habeas corpus made pursuant to 28 U.S.C. § 2241 et seq.

On February 27, 1974, the District Court granted petitioner's pro se motion for certificate of probable cause and for leave to proceed on appeal in forma pauperis. By Order dated May 10, 1974 this Court appointed Paula Van Meter, Esq. to represent petitioner in his appeal to this Court.

An evidentiary hearing was mandated by this Court in U.S. ex rel. Robinson v. Zelker **, 468 F.2d 159 (2d Cir.

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* Reference to "R" are to the Record on Appeal. The number immediately following "R" refers to the document number; where appropriate, reference to a particular page of a document or to an exhibit annexed to a document will be indicated by a hyphen followed by the page number or exhibit letter. Copies of the District Court's Opinion and the docket entries are alsc included in the Appendix.

** When petitioner filed his application he was confined in Green Meadow Correctional Facility, Comstock, New York, and, accordingly, named J.P. Conboy, Superintendent of that facility, as respondent. Petitioner was transferred to the custody of John L. Zelker, Superintendent of Green Haven Correctional Facility, Stormville, New York during the pendency of this Court's previous adjudication. At the outset of the evidentiary hearing held before the District Court, respondent moved to amend the caption of the case to reflect that Leon J. Vincent is presently the Superintendent of Green Haven Correctional Facility. Respondent's motion was granted and, accordingly, the caption has been amended.

1972), cert. denied, 411 U.S. 939 (1973) (hereinafter [468 F.2d at]) which held that petitioner was deprived of his Sixth Amendment right to counsel under United States v. Wade, 388 U.S. 218 (1967), at a show-up conducted on the night of his arrest. Left undetermined was the question of whether the series of police practices to which petitioner and the identifying witness were exposed before trial were so impermissibly and unnecessarily suggestive that the resulting in-court identification constitued a denial of due process to petitioner [468 F.2d at 163]. Also unresolved is the determination that testimony concerning such pretrial identification must be excluded under Gilbert v. California 388 U.S. 263 (1967) [468 F.2d at 163, n. 8]. The remand to the District Court for the evidentiary hearing was to determine specifically whether the State could show by clear and convincing evidence that basis independent of and untainted by the unconstitutional pretrial procedures existed for the in-court identification of petitioner at trial. The District Court found that such independent source did exist on the weight of the testimony of the identifying witness (R. 22).

The findings and Order of the District Court should be reversed. The District Court based ints decision on inapplicable rules of law and inappropriate standards of proof. The findings of the District Court are clearly erroneous in direct contradiction of undisputed facts and documentary evidence. Furthermore, the petitioner's complaint of Fourteenth Amendment violation and demand for exclusion of testimony

under Gilbert v. California, supra, remain for resolution by this Court.

Procedural History

On February 18, 1970, petitioner was found guilty after a trial by jury in the Supreme Court, New York County (Frank, J.), of robbery in the first degree, grand larceny in the third degree, possession of a weapon and assault in the first degree. On March 20, 1971, he was sentenced to a prison term of 8 years 4 months to 25 years on the robbery count and to concurrent lesser terms on the other counts. Petitioner is presently serving this sentence.

Petitioner appealed his conviction pro se to the Appellate Division, First Department. On February 25, 1971, that Court affirmed the judgment of conviction without opinion (R. 1-C). Petitioner's pro se application for permission to appeal to the New York Court of Appeals was denied by Judge Scileppi on April 7, 1971 (R. 1-A).

Petitioner filed application for a writ of habeas corpus in the United States District Court for the Southern District of New York on May 5, 1971. Petitioner's pro se application was denied without a hearing (Cooper, J.) by Order dated December 15, 1971 (R. 12), and a certificate of probable cause and leave to proceed an appeal in forma pauperis granted on January 21, 1972 (R. 15).

On September 28, 1972 this Court reversed the denial of the application and remanded the case to the District Court for an evidentiary hearing on the question of impermissible taint to an in-court identification. The evidentiary hearing ("Hearing") was held by the District Court on May 29, 30 and June 11, 19, 20 21, 1973 (R. 24-30).

STATEMENT OF FACTS

A. The Crime

On May 3, 1968 at approximately 11:30 A.M. Daniel Greenberg, operator of a parking lot on West 46th Street in Manhattan, was returning from a bank carrying a blue airline bag containing change which he had just obtained for use in the parking lot (STM. 92, 95, 97)*. While walking on the south side of West 46th Street, Mr. Greenberg was shot in the back by a young man who took the blue airline bag and fled into a white Mercury automobile which was standing at the northeast corner of 8th Avenue (STM. 99, 100, 47).

One of the eyewitnesses to the crime was Patrolman Ferdinand Voltaggio assigned to the Parking Enforcement Squad, who was driving a police tow truck, with car in tow, and stopped for a red light at the southwest corner of 46th Street and 8th Avenue (STM. 110, 112, 115; HTR. 6).**

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* "STM." followed by a number refers to the State Court trial minutes and page therein. The trial minutes have been lodged with this Court as an exhibit and constitute part of the record on appeal.

** "HTR". followed by a number refers to the District Court Hearing transcript and page therein. The hearing transcript has been lodged with this Court.

Hearing a noise Patrolman Voltaggio's attention was attracted westerly to 46th Street where he observed a young man with gun in hand pick up a blue airline bag from a body lying in the street and start running down 46th Street to 8th Avenue (STM. 116, 117; HTR. 7, 8). Distracted by traffic noise, averting his eyes at least once, Patrolman Voltaggio intermittently observed the apparent assailant run to the white Mercury automobile (STM. 117, 118; HTR. 8). Patrolman Voltaggio made no attempt to stop the apparent assailant but instead waited in his tow truck and followed the white Mercury when it proceeded up 8th Avenue and turned onto 48th Street where both car and truck were stopped in traffic (STM. 118, 119; HTR. 15, 16). At this point the apparent assailant left the car and fled (STM. 119; HTR. 17). Patrolman Voltaggio again made no attempt to apprehend but instead approached the white car and arrested its two other occupants, brothers Walter and Charles Pyle (STM. 119, 120; HTR. 22, 23).

A search of the automobile by Patrolman Voltaggio produced a blue airline bag containing change, a box of .22 calibre shells, and a Hertz rental agreement which was in the car's glove compartment (STM. 121, 122, 147; HTR. 23). The rental agreement indicated that the car had been rented the day before by petitioner, Carl Robinson, with Carl Robinson's name and home address appearing on its face (STM. 227; Exhibit 6; HTR. 25 Exhibit 1).

B. Report at the Precinct Station

Patrolman Voltaggio then took the Pyle brothers and the discovered articles to the nearby 18th Precinct where he made a report of the crime to Detective Matthew Horan (STM. 219; HTR. 59-63). As a result of this report a police alarm was transmitted by Patrolman Voltaggio describing the unapprehended assailant as "25 years old, 5'7", 150 lbs., brown complexion, wearing dark jacket and pants." (STM. 150, Exhibit 7; HTR. 151 Exhibit 2). This was the description furnished by Patrolman Voltaggio within hours of the crime on May 3, 1968 (STM. 150; HTR. 151).

C. The Warrant Hearing

On the night of the crime, Detective Horan went to petitioner's home at 40 Martin Place, Port Chester, New York (STM. 218, 220, 356). Not finding petitioner, Detective Horan accompanied Odessa Chambers, the woman with whom petitioner was living and whom he subsequently married, to Manhattan Criminal Court where a hearing was held before Judge Bloom on the issuance of a warrant for petitioner's arrest (STM. 222).

Three witnesses testified at the Warrant Hearing, Detective Horan, Odessa Chambers and Patrolman Voltaggio (STM. 223; WHM. 2-15).* The Warrant Hearing was held in Judge Bloom's chambers (WHM. 2). All three witnesses were present in the chambers through the entirety of the Warrant Hearing and each clearly heard the testimony given by the others (WHM. 2-15).

The first witness was Detective Horan who briefly described the crime as a robbery and assault involving three individuals, two of whom had been captured. When asked by the Court if the identity of the third person was known, Detective Horan answered unequivocally, "we have the third party's girlfriend with us ... His name is Carl Robinson " (WHM. 3, 4).

The second witness at the Warrant Hearing was Odessa Chambers who testified that she had last seen petitioner when he left their house that morning. When asked to describe petitioner and the clothing he was wearing, Ms. Chambers testified that petitioner was "brown-skinned" between 5'6" and 5'7" in height, and was wearing "a black suit with a blue tie and light shirt and black shoes and no hat", with the immediate correction, "he could have been wearing a light colored pair of pants" "they might have been light" (WHM. 11, 12).

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* "WHM." followed by a number refers to the Warrant Hearing minutes and a page therein, introduced into evidence at the evidentiary hearing as Exhibit 8, and lodged with this Court.

Patrolman Voltaggio, who had been present during all of the foregoing testimony was the final witness.* He testified as to what he had observed at the scene of the crime and described the assailant as follows: "He was brown-skinned, Negro, he was about 5'7" or 5'8", he had a dark jacket and, I believe, he had on light pants" and no hat (WHM. 14). Patrolman Voltaggio's description repeated virtually verbatim the description given by Odessa Chambers, but differed considerably from the description he had given to Detective Horan earlier at the 18th Precinct.**

On the basis of such testimony Judge Bloom signed a warrant for petitioner's arrest and directed that a complaint be issued against Carl Robinson.

D. The Show-Up

Conflicting testimony has been given concerning the details of a station house show-up of petitioner to Patrolman Voltaggio, the sole identifying witness at the trial. Certain facts remain undisputed, however, and provide a skeletal account of the proceedings.

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* Patrolman Voltaggio testified at the District Court evidentiary hearing that he was the first witness called at the Warrant Hearing (HTR. 31, 80). The minutes of the Warrant Hearing establish, however, that he testified last (WHM. 12).

** The various conflicting description of the assailant given by Patrolman Voltaggio are discussed infra at pp. 6, 16, 32, 34.

On the evening of May 4, 1968, the day after the commission of the crime and issuance of the Warrant, Detective Horan went to Port Chester, arrested petitioner, and brought him back to the 18th Precinct where he was booked (STM. 224, 243; HTR 335). Several hours later Patrolman Voltaggio was called from his home to report to the 18th Precinct. Upon arrival, Patrolman Voltaggio spoke briefly with Detective Horan and was subsequently brought into the squad room wherein petitioner was sitting, petitioner being the only individual in the room who was black and not a member of the police force (HTR. 230, 358, 359). Detective Horan pointed to petitioner and asked Patrolman Voltaggio, "Is this the perpetrator here?" (HTR. 34, 230, 345) to which Patrolman Voltaggio replied, "Yeh, that's the fellow that did the shooting". (STM. 176; HTR. 108, 109). A lineup was never conducted (STM. 325, HTR 116), and counsel for petitioner was not present during this confrontation (STM 176).

1. Petitioner's Testimony Concerning the Show-up

Petitioner testified at the Hearing as to significant additional facts concerning the show-up. Petitioner states that at the 18th Precinct he was interrogated and was singly displayed before a one-way mirror on two separate occasions (HTR. 412-421), and that he requested to see and talk with an attorney but was told that he could have an attorney only "after he had told the

police what they wanted to know" (HTR. 407). In the course of his testimony petitioner provided detailed description of the squad room mirror identification room, providing a diagrammatic sketch of the mirror room conceded to be accurate by Detective Horan (HTR 269, 270, Exhibit 5) and complete details of the mirror displays and final meeting with and identification by Patrolman Voltaggio.

2. Patrolman Voltaggio's Testimony

Patrolman Voltaggio has given several inconsistent accounts of the details of the show-up. Patrolman Voltaggio informed the Assistant Attorney General assigned to the case that he had identified petitioner from a line-up, described in intricate detail, and not from a one-man show-up (HTR. 113-116). At the Hearing Patrolman Voltaggio acknowledged that a show-up indeed had taken place and that no line-up was conducted (HTR. 116).

3. Detective Horan's Version

Detective Horan gave no testimony at the trial concerning the conduct of the show-up, and had limited recollection of the event as the basis of his testimony at the evidentiary Hearing (HTR. 271). At the Hearing Detective Horan testified that petitioner was taken into only one room in the 18th Precinct and was not displayed before a one-way mirror (HTR 347, 348). Detective Horan did confirm that the details furnished by petitioner about the 18th Precinct rooms were accurate, however (HTR. 270).

E. The Arraignment

Petitioner was arraigned on May 5, 1968 (HTR. 354, 355, 441) at which time he entered a plea of not guilty. Patrolman Voltaggio was present for the arraignment and, for the second time, viewed petitioner in the custody of Detective Horan (STM. 192, 193). Patrolman Voltaggio testified at trial that he was present at the arraignment specifically in connection with the case against petitioner (STM. 192).

At the Hearing Patrolman Voltaggio denied that he had been present at petitioner's arraignment (HTR. 124), however, this is in contradiction of his earlier testimony as well as the testimony of both Detective Horan and petitioner (HTR. 355, 438-441).

F. The Photo Display

Patrolman Voltaggio testified at the trial that he was shown a photograph of petitioner by Detective Horan who stated, "Look here is a photograph, Carl Robinson" (STM. 198, 199). Voltaggio testified that the photo display occurred in court sometime after petitioner's arrest, but was unable to provide further details. The record would indicate and this Court did find that, ". . . Detective Horan at some time,

apparently at the arraignment, showed Voltaggio a photograph - the necessity for which does not appear" [468 F.2d at 164].

Patrolman Voltaggio testified at the Hearing that he could no longer remember an in-court photo display but did recall that two photographs of Carl Robinson were shown to him by Detective Horan "a couple of months" after the show-up (HTR. 37, 391, 120, 127). Patrolman Voltaggio testified that this double photo display took place during a "hearing" conducted at St. Vincent's Hospital where the victim of the crime was recuperating (HTR. 126-131), however this testimony was shown to be false by the record which indicates that Detective Horan was not present at the only hearing conducted at St. Vincent's Hospital, and therefore could not have displayed the photographs to Voltaggio at that time (HTR. 356, 357).

G. The Trial

The only means by which the State could link petitioner with the actual commission of the crime was through eyewitness identification of Carl Robinson as the assailant. The only other evidence which the State could produce was the car rental agreement which could not be sufficient to connect petitioner to the scene of the crime or to its commission. The identification testimony, therefore, is the critical factor of the trial. It should be noted at the outset that the victim and three eyewitnesses to the crime testified at the trial. Only one witness, Patrolman Voltaggio, identified petitioner as the assailant.

Eyewitness Testimony

JUERGEN SCHUMANN, an electronics engineer, testified that on May 3, 1968 at approximately 11:30 A.M., while standing on 46th Street just west of 8th Avenue he observed "a male negro approach an older man across the street and shoot him in the back" (STM. 43, 44). Mr. Schumann observed the assailant remove a blue airline bag from the hands of the victim and run to a white Mercury automobile waiting at the northwest corner of the avenue (STM. 46, 47). Mr. Schumann observed the crime from directly across the street (STM. 61), and he pursued the assailant toward 8th Avenue until the assailant entered the white car (STM. 47). As this Court observed, Mr. Schumann had opportunity for "close up observation" and was capable of "detailed description" of the assailant, but

Mr. Schumann did not identify petitioner as the assailant [468 F.2d at 165].

JOSEPH BARCELO testified that at approximately 11:30 A.M. on May 3, 1968, while crossing the intersection of 46th Street and 8th Avenue, his attention was attracted by loud traffic noise and he observed a man enter a white Mercury automobile at the northeast corner of the intersection (STM. 21). Mr. Barcelo testified that he noticed another person "running and yelling" which person he identified as Mr. Schumann (STM. 22). Mr. Barcelo did not identify petitioner as the man he saw enter the white automobile.

DANIEL GREENBERG, a parking lot operator, testified that on May 3, 1968 he was walking along West 46th Street when he heard someone shout, "I'm going to shoot" (STM. 99, 100). He looked back, heard a shot, felt pain and fell to the pavement (STM. 100, 101). Mr. Greenberg testified that someone then bent over him, took the blue airline bag containing change which he had been carrying, and ran toward 8th Avenue (STM. 101,

102). Mr. Greenberg gave a general description of the assailant, but did not identify the petitioner as being that same person.

FERDINAND VOLTAGGIO, a police officer assigned to the Parking Enforcement Squad, testified that he observed the crime from the tow truck he was operating which was stopped for a traffic light at the southwest corner of 46th Street and 8th Avenue (STM. 110, 112). Patrolman Voltaggio testified that he heard a shot and looked in its direction in time to see a person with a gun in his hand standing over a body lying on the pavement approximately 50 feet away (STM. 115, 116, 154). Voltaggio then observed the apparent assailant pick up a blue bag, put the gun in his belt, and run to a white automobile, although his attention was distracted during part of this time by a traffic disturbance (STM 116, 117). Voltaggio followed the white car in his tow truck until both vehicles became caught in traffic (STM. 119). Voltaggio testified that the apparent assailant then jumped from the car and fled, at which time Voltaggio arrested the other two occupants of the car, the Pyle brothers (STM. 119, 120).

Patrolman Voltaggio testified at trial that he was able to observe the apparent assailant's face for 14 seconds while he ran to the waiting car, and another 3 seconds as he fled from the car (STM. 196, 197). This Court has found,

however, that the record indicates that the maximum time for observation would have been only 7 seconds [468 F.2d at 164].

Patrolman Voltaggio testified about the stationhouse show-up (STM. 176), as previously discussed, as well as about his viewing of petitioner's photograph (STM. 192, 193).

Patrolman Voltaggio described the apparent assailant at trial as follows: "approximately 5'7", about 25 years old - 23 to 25 - had on dark suit jacket, dark pants, light-skinned, about 150 pounds, Afro haircut with a part in it, and a moustache" (STM. 149, 150). Considerable detail is added and difference exists between this description given 21 months after the viewing of the crime and that reported several hours after the crime but before any display of petitioner to Voltaggio, as this Court has previously noted [468 F.2d at 164].

At the trial Voltaggio identified petitioner as the apparent assailant whom he had observed on May 3, 1968 (STM. 116). Voltaggio indicated that the appearance of petitioner at trial differed from his recollection of the apparent assailant in that "he had a different haircombing" and had "a little moustache then" which petitioner did not have at the trial (STM. 149, 150). No objection was made by defense

counsel to this in-court identification,* and no inquiry was made by the trial judge to determine whether the in-court identification had an independent origin. In the course of that testimony Voltaggio also made direct reference to his pretrial identification of petitioner at the 18th precinct by stating that petitioner - alleged assailant, "had a little pencil stripe moustache which he didn't have the next day when I had him in the station house" (STM. 149) [emphasis added]. No objection was made by defense counsel to this reference to pretrial exposure.

Three other witnesses, none of whom were present at the scene of the crime, gave testimony concerning petitioner's physical appearance. FRANCIS BROOKS, who had been employed as a car rental representative for Hertz in White Plains, New York, testified that he rented a car to petitioner on the evening of May 2, 1968 (STM. 259-262). (At the trial it was stipulated that petitioner had signed the Hertz rental agreement found in the white Mercury (STM. 259).) When asked if petitioner looked "substantially the same" at the trial as when he rented the car, Brooks replied that he did and added

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* After the jury retired to deliberate petitioner himself protested that he was never give a "fair lineup" and was "identified improperly" (STM-Court's Charge p. 65).

that he "had a little more moustache" on May 2, 1968* (STM. 264-265). Brooks did not mention petitioner having a different hair style when he rented the car. WILLIAM ALVIN HOLMES, who had known petitioner for about 13 or 14 years, testified that he never knew petitioner to wear a part in his hair and never knew him to have a "thicker or heavier" moustache than he had at the time of trial (STM. 401, 402). JOHN OWEN PLUMMER ROBINSON, petitioner's brother, testified to the same effect (STM. 403, 404).

Petitioner, CARL MAXIE ROBINSON, testified in his own defense that on the evening of May 2, 1968, J. B. Ray, a friend since childhood, requested petitioner to rent a car for him which petitioner consented to do, understanding that since Ray was not a resident of the area he might encounter difficulty in completing the rental himself (STM. 329, 333, 352, 353). Petitioner, Ray and their mutual friends Charles and Walter Pyle traveled to the Hertz agency in White Plains, New York where petitioner signed for the rental of a white Mercury automobile, for which Ray paid the expense (STM. 326, 327, 340). Ray then drove petitioner back to petitioner's

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* At the trial, Brooks was asked if petitioner has a "moustache now"; he responded "a little" (STM. 267). Voltaggio, on the other hand, indicated that petitioner did not have a moustache at the trial but had a "little moustache" previously (STM. 149, 150).

home in Port Chester after which Ray and the Pyle brothers proceeded on in the rented car (STM. 330, 339, 340, 350). Petitioner testified that he left the rental agreement in the glove compartment of the car (STM. 358); that he never saw the car again (STM. 330, 350); and that he had not seen J. B. Ray since that night (STM. 333) and did not know of his whereabouts at the time of the trial (STM. 351).

Petitioner denies committing the crime against Daniel Greenberg with which he was charged (STM. 332; R, 1, 9, 10). Petitioner testified at trial that on May 3, 1968, he slept until approximately 11:00 A.M., borrowed a friend's car and spent the day at Rye Beach (STM. 376, 383, 376). On his return from the beach he stopped at the home of a relative and did not return to his own home until approximately 10:00 P.M. (STM. 379).

The Defense Witnesses Who Felt Intimidated By the Court and Therefore Did Not Testify

Walter and Charles Pyle the two occupants of the white Mercury arrested by Voltaggio appeard in Court on two separate occasions to testify on behalf of petitioner (STM. 304) and, in their words, "tell the truth" about the case (STM. 316, 317). They were unquestionably material witnesses (STM. 286, 287) and it was anticipated that their testimony would exonerate petitioner (STM. 433; Judge's Charge p. 65). The robbery charges against the Pyle brothers had previously been dismissed by the grand jury (STM. 304).

The Pyle brothers never did testify at trial, however. On each occasion the Court and the prosecutor, in an effort to "educate" them of the risk of self-incrimination inherent in giving testimony, caused them to become intimidated and flee from the courthouse (STM. 318, 319, 421, 438-440).

The Judge contacted the Pyles' attorney, Richard Dienst, and directed him to appear in court to explain for the record the position which the Pyle brothers had taken. In court Mr. Dienst described a conversation he had had with the Pyles following their initial confrontation with the Court, as follows:

> "Judge, yesterday afternoon at approximately 3:00 p.m. the Pyle brothers came to my office, made a statement to me that they felt that they were being intimidated by this Court in that they would not be given permission to testify precisely as to the facts and circumstances surrounding an occurrence involving Mr. Carl Robinson for a robbery case which is presently pending before your honor (STM. 431).*

Mr. Dienst further noted that he had advised the Pyles that:

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* Dienst later stated:

> "I can state for the record that when the Pyle Brothers came into my office yesterday afternoon they were in a state of agitation. They were quite upset, and they felt that the Court and the District Attorney were intimidating them, and this is primarily why they did come to my office yesterday" (STM. 437).

> ". . . if the facts that they related to me about which they were going to testify were true, they had a moral obligation to Mr. Carl Robinson to come into this Court and tell this Court precisely the facts and circumstances surrounding the incident that they were a party to or had knowledge of" (STM. 433).

The Court refused to allow sufficient time to arrange for resolution of the misunderstanding with the Pyles and made no effort to encourage introduction of their critical testimony (STM. 325, 417).

The Summation and Charge

Although the eyewitness Juergen Schumann did not identify petitioner at the trial, both the prosecutor in his summation (STM. 461) and the Judge in his charge erronously stated to the jury that he did. On three separate occasions the Judge indicated to the jury that Schumann had identified petitioner as the man he saw shoot and rob Greenberg (TJC. 18, 30, 31)*. The Judge corrected himself on two of these occasions after a bench conference with the prosecutor (TJC. 18, 31). His third mistatement concerning Schumann's identification went uncorrected (TJC. 31).

During his summation, the prosecutor made extensive reference to the station house show-up identification of petitioner by Voltaggio as further evidence of the petitioner's guilt (STM. 465-468). The Judge also referred to Voltaggio's identification of petitioner in his charge (TJC. 38) in spite of the fact that counsel for petitioner had not been present during such identification. The Judge also failed to instruct the jury to consider whether such pretrial viewing of petitioner may have tainted or impaired or had some form of suggestive effect on Voltaggio's identification in court.

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* "TJC." followed by a number refers to a page of the trial Judge's charge to the jury which accompanies the trial minutes.

H. The Evidentiary Hearing

This Court mandated a hearing in District Court to determine whether the ability of Patrolman Voltaggio to identify the assailant had been so tainted by the illegally conducted precinct station show-up that the in-court identification of petitioner should be excluded from evidence, or whether the basis for the in-court identification had remained independent of and untouched by such illegality. No other evidence was offered by the State linking petitioner to the crime, since the Hertz rental agreement indicates no more than possible facilitation, making the determination of the credibility of Voltaggio's testimony and identification of critical significance.

Three witnesses testified at the Hearing: Patrolman Voltaggio, Detective Horan and petitioner, Carl Robinson. For detailed discussion of their testimony see Petitioner's Post-Hearing Memorandum (R. 20).

Voltaggio's Testimony: The testimony of Patrolman Voltaggio given at the Hearing is marked by inconsistent statements, faulty recollection of events and in certain instances false statements of fact. Indeed, the Court had occasion to state, "The witness [Voltaggio], I am frank to put on the record, is not an alert mentality, he is not keen" (HTR. 555).

In his testimony regarding his opportunity to observe the apparent assailant at the scene of the crime Voltaggio stated that he saw the assailant run to the northwest corner of 46th Street and 8th Avenue and that the assailant remained "standing there" for a "couple of seconds" before crossing to the white car (HTR. 562, 563, 566). This testimony conflicts with the testimony Voltaggio gave at the Warrant Hearing, that the assailant, "picked-up the blue bag . . . and he ran right across 8th Avenue" (WHM. 13). This description of events also conflicts with his trial testimony (STM. 163, 163, 183), and the trial testimony of Juergen Schumann that Schumann had pursued the assailant, running after him across the intersection (STM. 46, 47), and also conflicts with the detail of the Judge's charge to the jury (TJC. 31). This Court has already noted other instances of inaccurate recollection of detail and inconsistent testimony given previously by Voltaggio [468 F.2d 164, n. 10].

Further Conflicting Testimony

Conflicting testimony was given by Voltaggio in his testimony at the Hearing regarding his cognizance of the purpose of such Hearing.

Voltaggio was asked if he had been told of the purpose of the Hearing to which he responded, no (HTR. 48). The Court interrupted cross-examination with the following questions (HTR. 53):

"The Court: Officer, you told Mr. Marshall, or, rather, you answered his questions earlier, that you don't know what this hearing before me is about. Did you really mean that?

The Witness: Yes.

The Court: How long have you been a policeman?

The Witness: Twelve years.

The Court: Well, did it occur to you to ask, to be enlightened, as to why you are coming down to testify about a case that is many years old, that resulted in a trial, in a conviction, and a sentence and what this is all about? Didn't it occur to you?

The Witness: No, your Honor.

The Court: And no one enlightened you?

The Witness: No."

This denial was contradicted by Detective Horan who testified that a meeting was held on the morning of the day on which Voltaggio testified, at which the Assistant Attorney General informed both Horan and Voltaggio of the purpose of the Hearing (HTR. 239, 240).

Voltaggio was recalled to the stand on the final day of the Hearing at which time he was questioned on his previous testimony. Voltaggio at this point admitted that he had been told that petitioner "was bringing an application for federal habeas corpus release" and that the ground for the application concerned the issue of "identification" (HTR. 533, 534). When asked by the Court to explain why he

had previously testified that he did not know the purpose of the Hearing Voltaggio simply responded, "I didn't remember what was on the record and what was not on the record as far as what I had spoken with him about" (HTR. 537, 538)

Voltaggio could not testify with precision on the details of the pretrial identifications of petitioner because of faulty recollection (HTR. 105, 106, 573, 574). Indeed, as discussed at p.10 infra, prior to the Hearing Voltaggio could not recall that a show-up had taken place, recalling instead that a line-up had occurred (HTR. 113-116).

SUMMARY OF ARGUMENT

I. The only eyewitness to the crime with which petitioner was charged who identified petitioner as the assailant was Voltaggio. Voltaggio's in-court identification was the only evidence which connected petitioner to the scene of the crime or to its commission. In a brief 7 seconds Voltaggio had an opportunity to observe the many details to which he testified. The District Court below noted that Voltaggio "is not an alert mentality, he is not keen" (HTR. 555).

Voltaggio reported a description of the assailant immediately after viewing the crime. He later changed this description on numerous occasions, each time after having been exposed to a suggestive description of petitioner, an unlawful show-up of petitioner, and an unnecessary viewing and photo display of petitioner. In each instance in which he varied his description of the assailant, Voltaggio did so in a way that made it more closely resemble petitioner than his initial record of the observed assailant. Following the pretrial identification, which this Court has found to be in violation of United States v. Wade, Voltaggio made his in-court identification.

Voltaggio never formed a definite image of the assailant, as demonstrated by his inconsistent descriptions. Indeed, in

light of the circumstances, Voltaggio was incapable of forming a definite image. Voltaggio's in-court identification resulted directly and exclusively from the unlawful pretrial exposures to petitioner.

II. The District Court erred as a matter of law in its application of the appropriate law to its examination of "independent source" for Voltaggio's in-court identification, and therefore must be reversed. The District Court confused the rules applicable to in-court identification mandated by this Court and the Supreme Court of the United States. The District Court incorrectly applied the standard of Stovall v. Denno in examining the suggestive pretrial procedures, and failed to make the necessary determination that the in-court identification had a source independent of these unlawful pretrial procedures as required by United States v. Wade. Furthermore, the District Court made its findings upon an improper and inadequate standard of proof finding that the State had sustained its burden of proof by a "fair preponderence of the credible evidence" rather than by the required heavier burden of "clear and convincing proof."

III. The police practices to which petitioner and the identifying eyewitness were exposed were so un-

necessarily and impermissibly suggestive that the in-court identification of petitioner by the witness resulted in a denial of due process to petitioner. Patrolman Voltaggio had heard petitioner labeled as the assailant and described at the Warrant Hearing; petitioner was displayed to Voltaggio at an unlawful show-up; and Patrolman Voltaggio viewed petitioner in the custody of his fellow officers and was shown a single photo of petitioner. These practices, individually and collectively, violated petitioner's right of due process.

V. Petitioner was denied his right to due process of law throughout his state trial by reason of his inadequate representation by counsel and the numerous, prejudicial errors committed by the Prosecutor and by the trial judge.

ARGUMENT

I. THE IN-COURT IDENTIFICATION OF PETITIONER WAS SO TAINTED BY THE UNCONSTITUTIONAL HIGHLY SUGGESTIVE POLICE IDENTIFICATION PROCEDURES THAT IT MUST BE EXCLUDED AND THE JUDGMENT OF CONVICTION OVERTURNED.

This Court has already determined that Petitioner was entitled to have had counsel present at the pretrial stationhouse "show-up" as mandated by United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) [468 F.2d 159]. An arrest warrant having been issued, this Court found that "adversary judicial proceedings" had been initiated within Kirby v. Illinois, 406 U.S. 682 (1972) such that the exclusionary rules of Wade and Gilbert became applicable [468 F.2d at 163]. It was also found that there appeared to be no "substantial countervailing policy considerations" against requiring the presence of counsel since no exigent circumstances existed in relation to the "show-up" of petitioner [468 F.2d at 163].

Since counsel was not present during the pretrial show-up, United States v. Wade, supra, directs that testimony dealing with such pretrial identification may not be introduced at trial, and further that an in-court identification by a witness such as Voltaggio who was exposed to such illegal

pretrial procedure may not be used as basis for conviction unless such in-court identification is shown by clear and convincing proof to be based solely on independent basis and unaffected by the pretrial procedures.

A. Voltaggio's In-Court Identification Resulted Directly from the Illegal Police Procedures and Not From an Independent Source.

1. The Identifying Witness' Opportunity for Observation of the Assailant was Insufficient.

Patrolman Voltaggio observed the apparent assailant as the assailant was running, at times with his back to Voltaggio, for a maximum total time of seven seconds at a distance varying from 25 to 50 feet [468 F.2d 164]. Voltaggio's view of the assailant must have been partially obstructed because as witness Schumann testified, there were cars from the parking lot parked along the south side of 46th Street where the crime was committed (STM. 45). In addition, Voltaggio testified that his attention was distracted at one time away from the assailant to the white automobile on the other side of the avenue. It should also be noted that, as found by the District Court, Voltaggio "is not an alert mentality, he is not keen" (HTR. 555). Also, as noted by this Court, Voltaggio's recollection of details of the incident was limited [468 F.2d 164, n. 10].

The Wade decision directs that initial primary attention be given to the "prior opportunity to observe the criminal act" in determination of whether an independent basis exists for a subsequent in-court identification. Voltaggio's oppor-

tunity to observe the assailant was so limited and of such short duration that it cannot be viewed as so firm a basis as to prevent susceptibility to suggestion by police practices aimed at identification of petitioner.

2. Discrepancies Exist in the Identifying Witness' Description of Assailant.

Several hours after the fleeting observation Voltaggio had of the apparent assailant, Voltaggio reported a description of the assailant to the 18th Precinct Police for communication in a police alarm (HTR. 151, 190). Patrolman Voltaggio was trained, as a police officer, as to the requirements for exactitude in giving such descriptions. The record shows that the details about the appearance of the assailant which Voltaggio had perceived and reported were that he was 25 years old, 5'7", 150 pounds, brown complexioned, wearing a dark suit (HTR. 151, Exhibit 2).

At the Warrant Hearing after listening to the suggestion made by Detective Horan that petitioner was the assailant, and after hearing the description of petitioner given by Odessa Chambers, Voltaggio described the assailant differently than his previous police report and in such a way as to duplicate the description of Ms. Chambers: "brown-skinned, 5'7" or 5'8", wearing a dark jacket and light pants" (WHM. 14). The fact that Voltaggio changed his description of the assailant indicates that a firm mental picture had not been established by the observation of the crime. Furthermore, the fact that

Voltaggio could be as malleable as to repeat virtually verbatim the testimony of a preceding witness displays Voltaggio's vulnerability to suggestion which was exploited by the illegal police identification procedures with respect to petitioner.

Voltaggio testified at trial that the assailant was: light skinned, about 150 lbs, 23-25 years old, 5'7", wearing a dark suit jacket and dark pants, and "he had an Afro haircut with a part in it" (STM. 149). In subsequent testimony Voltaggio also added that the assailant had a "little pencil stripe moustache" (STM. 149). The distinctive features of the parted Afro haircut and moustache had been added for the first time, 21 months after the viewing of the crime, as previously noted by this Court [469 F.2d at 164].

Voltaggio testified that he had seen petitioner at the illegal show-up on the day following the crime, and had been shown a photograph of petitioner which had been taken the day following such show-up (STM. 198). Voltaggio identified a photograph at the Hearing as being the photograph he had been shown (HTR. 57, 39, Exhibit B). It is interesting to note that the photograph marked as Exhibit B and submitted into evidence shows petitioner wearing an Afro haircut with a part. There is also evidence in the photograph of a faint thin moustache.

At the Hearing Voltaggio described the assailant as light skinned, 23-25 years old, 135-150 pounds, 5'8"-5'9", wearing a dark suit jacket, dark pants, a short Afro haircut and a pencil-stripe moustache (HTR. 19, 31, 32, 139). Again, this description was given after seeing the photograph earlier that same day and reviewing his previous trial testimony (HTR. 50, 51), but differed considerably from the description he had given five years earlier, immediately after viewing the assailant.

All of the varying descriptions given by Patrolman Voltaggio differ from that supplied by another eyewitness, Juergen Schumann. Mr. Schumann, who observed the entirety of the crime from a distance of 30 feet (STM. 43, 60) and pursued the assailant until he escaped in the white automobile, having held him in view the entire time (STM. 47, 58), described the assailant as being: early 20's in age, 5'8"-5'9", slim, medium negro coloring wearing unmatched dark trousers and jacket, and "his hair was neat" (STM. 58). No mention was made of an Afro haircut with a part, nor of a pencil stripe moustache, distinctive details likely to be remembered."* Neither did Mr. Schumann identify petitioner as being the assailant.

This Court stated in United States ex rel. Phipps v. Folette, 428 F.2d 912 (2d Cir. 1970), that, "the effort

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* In an affidavit which he filed with the District Court, petitioner refers to his having a "two inch scar" on his "forehead" (R. 9-5). Neither Voltaggio nor Schumann ever mentioned the assailant having a scar on his forehead.

[of the Court] must be to determine whether, before the imprint arising from the unlawful identification procedures, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor [i.e., the pretrial confrontation], id. at 915. In the case of a witness, such as Voltaggio, who changes his description of the assailant after he hears a description of the suspect, and changes it significantly again after he has viewed the suspect, in both instances making his description match that of the suspect rather than his initial remembrance of the assailant, such witness cannot be said to have a "definite image" in mind of the assailant

It is noteworthy indeed that of four eyewitnesses to the crime only one identified petitioner as the assailant. That witness was Voltaggio. Of the four eyewitnesses only one gave a description which differed from the others' and added details which matched characteristics of the petitioner. That witness was Voltaggio. Only one of the witnesses participated in an illegal show-up and photographic display of petitioner before trial. That witness was Voltaggio.

3. Voltaggio was Under Extreme Psychological Pressure to Make an Identification.

In his trial testimony Patrolman Voltaggio acknowledged that he had made no attempt to apprehend the

assailant, either at the scene on 46th Street or later at 48th Street (STM. 163, 166, 168, 169, 183). As a police officer having been in close proximity to the crime, Voltaggio may have later regretted his inaction and sought to restore his reputation by aiding in a speedy capture of the assailant.

An important factor to consider in testing the credibility of a witness' identification is the assesment of a witness' emotional state or interest in outcome such as would affect the objectivity of the identification, U.S. v. O'Connor, 282 F. Supp. 963 (D.D.C. 1968) aff'd 420 F.2d 644 (D.C. Cir. 1969). The level of objectivity of Voltaggio's identification of petitioner may have been significantly affected by his interest in absolving his own guilt in allowing the assailant to escape.

There is record of the fact that Voltaggio's superior, Detective Horan, stated in the presence of Voltaggio that the assailant was known to be Carl Robinson (WHM. 3, 4). At the stationhouse Voltaggio was shown a single suspect for identification, the petitioner (STM. 176; HTR. 108, 109). In effect, his fellow police officers were telling Voltaggio, "this is the man". See Biggers v. Tennessee, 390 U.S. 404, 407 (1968). Such suggestive confrontations are condemned because they increase the likli-hood of misidentification. United States v. Wade, supra; Neil v. Biggers, 409 U.S. 188 (1972).

The combination of factors of strongly suggestive pretrial exposure to petitioner plus psychological pressure to identify a suspect and thereby save his own reputation can be viewed as having caused Voltaggio whether consciously or subconsciously into making a false identification of petitioner at the stationhouse to which Voltaggio became committed and would or could not change in court.

B. The In-Court Identification Was the Sole Basis for Conviction and Therefore Could Not Constitute Harmless Error.

The United States Supreme Court ruled in Chapman v. California, 386 U.S.18, 24 (1967) that before a federal constitutional error may be held harmless the beneficiary of such error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. See also Harrington v. California, 395 U.S. 250 (1969).

Other than Voltaggio's identification of petitioner as the assailant, the only evidence the State produced at trial was the proof that petitioner rented the automobile used in the crime. This Court has already determined that, "It hardly follows inexorably from the fact that the car was rented by appellant, however, that he was the assailant." [468 F.2d at 165]; cf. United States v. Garrett, 371 F.2d 296, 299 (7th Cir. 1966) (defendant Andrew), modified sub. nom. Simmons v. United States, 390 U.S. 377 (1968)

Therefore, since Voltaggio's in-court identification was for all practical purposes the only evidence which the prosecution offered to connect petitioner with the crime, any taint to the in-court identification by the illegal pretrial show-up and related police practices could not be considered harmless error. United States ex rel. Bisordi v. La Vallee 461 F.2d 1020, 1023 (2d Cir. 1972); Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971).

II. THE DISTRICT COURT DECISION IS BASED UPON INCORRECT LEGAL STANDARDS AND ITS FINDINGS ARE CLEARLY ERRONEOUS.

A. The District Court Confused the Legal Standards of United States v. Wade and Stovall v. Denno and Applied the Incorrect Rule of Law to This Case.

1. The Rules of Wade and Stovell are Significiantly Different.

In United States v. Wade, supra, the Court directed that in any instance in which there is an in-court identification which is preceded by a pretrial identification without notice to or in the presence of counsel, and such pretrial identification occurs after adversary judicial proceedings have been initiated, there is a three-part effect:

1) the pretrial identification process in the absence of counsel violates the Sixth Amendment;

2) no reference to such illegal pretrial identification may be made in court; and

3) the courtroom identification is not admissible at all unless the State can establish by clear and convincing proof that the identification is not the fruit of the earlier confrontation.

In the companion case of Stovall v. Denno, 388 U.S. 293 (1967) the Court held that the Wade ruling was not to be applied retroactively but that cases involving "confrontations for identification purposes conducted in the absence of counsel" prior to June 12, 1967 were to be governed by the application of the principles of due process of law which, the Court ruled, involved an inquiry as to whether or not the confrontation in a particular case "was so unnecessarily suggestive and conducive to irreparable mistaken identification," as to make it unlawful, depending upon "the totality of circumstances" surrounding the confrontations. 388 U.S. at 302.

The standards of the two cases are different: the Wade decision develops a rule of inadmissibility of evidence stemming from a Sixth Amendment violation. The Stovall decision, on the other hands deals with a measure of weight of evidence within the parameters of due process essential fairness. Less stringent standards are applicable to pre-Wade identifications governed by Stovall. United States ex rel. Miller v. La Vallee, 436 F.2d 875 (2d Cir. 1970). As this Court pointed out,

> We think it clear that the rule of Wade applicable only prospectively and requiring a hearing and finding that "the in-court identifications had an independent source" based on "clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification" or a finding that the error was harmless, is clearly not the rule governing Stovall or other due process of law cases. To intermingle the two separate but analogous rules of Wade and Stovall can only result in confusion, some of which is already apparent.... United States ex rel. Rutherford v. Deegan, 406 F.2d 217, 218 (2d Cir. 1969).

2. The District Court Made Separate Findings of "Source" and "Possible Taint" Improperly Utilizing the Standard of Stovall Rather Than of Wade.

The present case involving a show-up of petitioner on May 4, 1968 without the presence of counsel is controlled by Wade, as this Court has already determined [468 F.2d 159].

. The District Court decision is divided into two parts. After stating the facts of the case, the Court analyzes the facts surrounding the opportunity for observation of the petitioner by Voltaggio at the scene of the crime (DCO. 17-26).* The Court examines the duration of the viewing, the visibility of the day, inconsistencies in Voltaggio's testimony concerning such viewing and explanation for such inconsistencies, and solely on the basis of such consideration makes its finding: "We conclude, therefore that the Government produced clear and convincing evidence of a source for the in-court identification arising independently of the illegal confrontation" (DCO. 26).

The Opinion does not examine the inconsistent description of petitioner given by Voltaggio nor other possible criteria for evaluating the possibility of taint to Voltaggio's in-court identification in making this determination of independent source. The Court does

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* "DCO." followed by a number refers to a page of the District Court Opinion (Cooper, J.) rendered below. The Opinion is contained in the Appendix.

list various suggested standards for testing the credibility of identification testimony (DCO. 17-19) but does not proceed to utilize these criteria in respect to the present case. As directed in Hawkins v. United States, 420 F.2d 1306 (D.C. Cir. 1969) [cited but apparently misconstrued by the District Court] the burden of establishing independent source of an in-court identification requires "considerably more than a showing that the observations provided ample foundation upon which the witness, absent the illegal confrontation, could make an identification." The District Court ignored the directive and found "independent source" solely by examination of the initial observation.

In a second part of the Court's Opinion (DCO. 26-33) discussed after the Court's finding of "independent source", the Court states: "We do not, however, ignore the possibility that a highly suggestive stationhouse confrontation could have distorted the mental image Voltaggio originally formed at the scene of the crime" (DCO. 26). The Court then discusses the possibility that the pretrial confrontation in the instant case constituted a violation of due process, concluding: "We find the conduct of the warrant hearing in no way created a 'substantial liklihood of irreparable misidentification' at the show-up or subsequently at trial", citing Simmons v. U.S., 390 U.S. 377 (1968) and Neil v. Biggers, 409 U.S. 188 (1972); (DCO. 29). Both the Simmons and Biggers decisions involved pre-Wade identification utilizing the Stovall due process standards which as discussed, are not appropriate for the necessary determination of the District Court, especially in light of the clear direction from this Court to rule "in accordance with Wade"[468 F.2d at 165].

The District Court has confused the Wade and Stovall standards as discussed in U.S. ex rel. Rutherford v. Deegan, supra. The District Court made its findings of "independent source" based solely on its examination of the testimony concerning the at-the-scene viewing of the assailant by the witness, Voltaggio. The Court then examined separately the question of possible taint to the in-court identification. Thus, the Court made its finding of source independent of its finding of lack of taint, rather than examining the two factors together to determine if the source of the in-court identification actually was independent of the illegal pretrial proceedings.

3. The District Court Failed to Apply the Clear and Convincing Standard.

The District Court utlized an incorrect standard of proof in making its determinations. The Court recognized that it must find "independent source" by "clear and convincing evidence" (DCO. 26) which is the standard the State must meet under United States v. Wade, supra. Yet it does not apply this standard to the evidence. The only basis which exists for the finding of source of the identification is the testimony of Voltaggio and the determination of its credibility since it varies considerably from the facts testified to by petitioner. On this measure of credibility the District Court ruled, "we are satisfied by a fair preponderance of the credible evidence that the truth is with Voltaggio and not with petitioner" (DCO. 14, emphasis added). Therefore, the District Court is acknowledging

that the State has not met its burden of proof of "clear and convincing evidence" but has merely supplied testimony succeeding by a "preponderance of the evidence", a lesser standard of proof. See Northwestern Mutual Life Insurance Co. v. Nelson, 103 U.S. 544 (1880).

In summary, the District Court decision must be overturned because it is based upon incorrect application of the rules of law. The Court misconstrued the rules of United States v. Wade, supra, confusing them with the lesser standards of Stovall v. Denno, supra, and thereby made an erroneous finding of independent source. Furthermore, such finding was based upon an incorrect standard of proof; the Court found that the State was able to show its basis for the in-court identification only by a "preponderance of the evidence" and not by the required measure of "clear and convincing proof."

B. The District Court's Findings of Fact Are Clearly Erroneous and Contradict Undisputed Facts and Documentary Evidence.

1. The Correct Standard Must be Applied in Determining that the Findings Are Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides, "Findings of fact shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The party seeking to overturn a factúal determination which has been based largely upon the credibility of witnesses has a heavy burden to meet, since the reviewing court will afford deference to the trial court's determinations. Hedger v. Reynolds, 216 F. 2d 202 (2d. Cir. 1954). However, a significant distinction has been made in relation to findings based upon written evidence or undisputed facts. As this Court determined in Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir. 1950):

> Where the evidence is partly oral and the balance is written or deals with undisputed facts then we may ignore the trial judge's finding and substitute our own,
>
> 1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or
>
> 2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.

2. Documentary Evidence and Undisputed Testimony Show that Voltaggio's Identification Was Tainted.

In this case there is sufficient evidence based upon documentary proof and undisputed facts to show that Voltaggio's ability to identify petitioner had been tainted by the pretrial procedures.

The basic details of the unlawful pretrial police procedure are not disputed. A Warrant Hearing was held at which Voltaggio heard the petitioner labeled as the assailant and heard him described by his girlfriend. It is undisputed that a one-man show-up was held by the police at which petitioner was displayed to Voltaggio as the single suspect in the case. It is also undisputed that a photograph of petitioner was displayed to Voltaggio prior to his in-court identification.

It is a matter of record that the description of the assailant which Voltaggio reported immediately after the crime did not contain specific detail to identify petitioner (HTR. 151, Exhibit 2). It was only after Voltaggio had seen petitioner at the unlawful show-up and had been shown petitioner's photograph that he gave a detailed description which matched the petitioner's characteristics. It is similarly a matter of record that in Voltaggio's testimony at the Warrant Hearing he changed the description of the assailant from that which he had reported in the police alarm to a version which matched the description given of petitioner by his girlfriend.

By simple comparision of the testimony given by Voltaggio at trial and at the Hearing with the description of the assailant Voltaggio reported to the police contained in Exhibit 2, the effect of the pretrial confrontations become apparent as having been profound.

The United States Supreme Court has determined that, "A finding is clearly erroneous, when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum, 333 U.S. 364, 394-395 (1948). In this case, the error of the District Court may clearly be seen to contradict significant documentary proof and undisputed facts.

3. Voltaggio's Credibility Was Impaired By His False Testimony.

It is a matter of record that Voltaggio gave false testimony at the Hearing when he denied knowing the purpose for the Hearing, (infra p 25). He later recanted this position with the explanation that he "didn't remember what was on the record and what was not" (HTR. 537, 538) which amounts to an admission that the degree of credibility of his tesimony may be a fluctuating one. The District Court was clearly in error in determining that the measure of truth lay with Voltaggio rather than with petitioner (DCO. 14).

III. THE POLICE IDENTIFICATION PROCEDURES WERE SO HIGHLY AND UNNECESSARILY SUGGESTIVE AS TO DEPRIVE PETITIONER OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

A. Pretrial Police Procedures May Be Constitutionally Impermissible Because Excessively Suggestive.

The United States Supreme Court has indicated that pretrial police identification procedures may be so unnecessarily or impermissibly suggestive and conducive to irreparable mistaken identification that they constitute a violation of the Fourteenth Amendment, i.e. that allowing a witness exposed to such procedures to make an in-court identification would be a denial of due process to the defendant. See Stovall v. Denno, supra; Simmons v. United States, supra; United States ex rel. Phipps v. Follette, supra.

B. The Series of Unlawful Police Practices Resulted in Due Process Violation to Petitioner.

In the present case there occurred a series of unnecessary, highly suggestive procedures any one of which makes the in-court identification doubtful but taken together unquestionably make the identification unconstitutional.

Even before the initial exposure to petitioner Voltaggio had heard him named as the assailant by a superior and heard his description at the Warrant Hearing (WHM. 3, 11, 12). Thus, the police had singled petitioner out as the assailant even before the show-up, giving added prejudice to the stationhouse confrontation.

While a one-man show-up is not per se impermissible, United States ex rel. Anderson v. Mancusi, 413 F.2d 1012 (2d Cir. 1969), it is considered unnecessarily and impermissibly suggestive when it is conducted where the alternative of a lineup is avaliable. The Wade Court discussed show-ups: "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is belived guilty by the police." 388 U.S. at 234. In Rudd v. State of Florida 477 F.2d 805 (5th Cir. 1973) the Court stated, "singling out or indicating to the witness that the man in custody is the man the police believe to have committed the crime is a classic example of impermissible suggestiveness". There were no exigent circumstances surrounding petitioner's case which would necessitate a show-up rather than the formation of a fairly constitued line-up. As the Supreme Court stated,

> Suggestive confrontations are disapproved because they increase the liklihood of misidentification, and unnecessarily suggestive ones are condemned, for the further reason that the increased chance of misidentification is gratuitous. Neil v. Biggers, 409 U.S. 188, 198 (1972).

The day following the show-up Voltaggio viewed petitioner at his arraignment, which in itself constitutes a violation of Wade, United States v. Luck, 447 F.2d 1333 (6th Cir. 1971), and was shown a single photograph of petitioner which is also impermissibly suggestive. Rudd v. State of Florida, supra.

In summary, the series of police identification procedures, i.e. the improperly conducted Warrant Hearing, the unnecessarily suggestive show-up, the arraignment viewing without counsel, and the single photo display must be viewed as collectively so conducive to irreparable mistaken identification that by allowing the resulting in-court identification petitioner was denied due process of law.

IV. THE IDENTIFYING WITNESS' TRIAL TESTIMONY OF HIS PRETRIAL IDENTIFICATION OF PETITIONER VIOLATED THE PER SE EXCLUSIONARY RULE OF GILBERT v. CALIFORNIA

A. Gilbert v. California Mandates Exclusion of Testimony Concerning Illegal Pretrial Identification.

The United States Supreme Court ruled in Gilbert v. California, 388 U.S. 263 (1967), the companion case to Wade, that when there has been a pretrial confrontation which is unlawful according to Wade, any reference to such pretrial procedure must be excluded from testimony even without examination of possible independent source. As the Court explained "the witness' testimony of his line-up identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial." 388 U.S. at 273-274. Such testimony may be ground for vacating a conviction unless it can be shown that it constitutes harmless error.

B. Voltaggio's Testimony About the Unlawful Pretrial Show-up Must be Excluded Because Not Harmless Error.

During direct examination by the prosecutor, Voltaggio testified to facts which unmistakably indicated to the jury that he had identified petitioner at the stationhouse the day after the crime. Thus, when asked by the prosecutor:

> "Q. Look at the defendant whom you have identified as the man you saw do the things you said you saw. Does he look any different today from that time?" (STM. 149)

Voltaggio responded:

> "A. Except for the hair he had a little pencil stripe moustache which he didn't have the next day when I had him in the stationhouse." (STM. 149, emphasis supplied).

The only evidence which linked petitioner to the scene of the crime and to the commission of the crime was the identification testimony of Voltaggio. In view of this, every fact pertaining to that identification was important, and it cannot be said that testimony concerning pretrial identification which undoubtedly strengthened the in-court identification was "harmless beyond a reasonable doubt" under Chapman v. California, supra. Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971). Therefore, the failure of the trial judge to instruct the jury to disregard this testimony concerning the pretrial identification is error sufficient in itself to warrant vacating petitioner's conviction.

V. PETITIONER WAS DENIED DUE PROCESS OF LAW AT HIS STATE TRIAL BY THE INADEQUACY OF HIS COUNSEL AND BY THE CONDUCT OF THE PROSECUTOR AND JUDGE

A. Defense Counsel's Lack of Preparation and Incompetent Performance at Trial Denied Petitioner the Effective Assistance of Counsel.

The record clearly indicates that defense counsel was inadequately prepared on the facts (STM. 29, 36, 59, 63, 65, 135, 323-325, 442-443, 451), and, more importantly, on the law controlling the case. Defense counsel never objected to the introduction of the in-court identification in evidence, nor did he object to the testimony concerning the pretrial identification of petitioner.

The Court in United States v. De Coster, 487 F.2d 1197, 1203-4 (D.C. Cir. 1973) directed that where defense counsel has failed to conduct an investigation into facts and potential evidence in the case, and has failed to move to suppress evidence where required, the defendant has been denied effective representation unless the government can establish lack of prejudice thereby. Since the in-court identification was the sole basis for petitioner's conviction, its introduction was "prejudicial" and the failure to make objection to its introduction exemplifies the inadequacy of petitioner's representation at trial.

B. The Conduct of the Prosecutor and Judge Intimidated Essential Defense Witnesses and Caused Error at the Trial.

As discussed at pp. 19-21 , the Court and Prosecutor caused two material witnesses for the defense, the Pyle brothers, to become sufficiently intimidated that they refused to testify. While it was the duty of the Court to apprise the witnesses of possible risk of self-incrimination, it was also the duty of the Court to encourage the introduction of all relevant, material testimony. The Pyles were the only ones who could inform the Court of the identity of the assailant, yet no attempt was made by the Court to facilitate the inclusion of their testimony.

Furthermore, a photograph of the Pyle brothers was admitted into evidence at the trial for the purpose of indicating the identity of the two men who were alleged to have been with the defendant at the crime (STM. 215). Since the Pyle brothers were present in court during part of the trial the jurors could have easily formed an impression unfavorable to petitioner from the Pyles' failure to testify on his behalf.

Further prejudice to petitioner was caused by the judge's error in charging the jury incorrectly that another eyewitness had identified petitioner as the assailant (TJC.18, 30). As the Supreme Court noted, "under any system

of jury trials the influence of the judge on the jury is necessarily and properly of great weight, and ... his lightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U.S. 614 (1894).

The combined factors of inadequate representation, deprivation of material witnesses and judicial error constituted a denial to petitioner of due process of law throughout his trial.

CONCLUSION

For each of the reasons stated, the findings of the District Court and its decision denying petitioner's application should be reversed with a direction for the writ of habeas corpus to issue.

Dated: New York, New York
September 3, 1974

Respectfully submitted,

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BRIEF FOR PETITIONER-APPELLANT

APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.
CARL M. ROBINSON,

Petitioner,

-against-

71 Civ. 1997

LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,
Stormville, New York,

OPINION

#40307

Respondent.

----------X

APPEARANCES:

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Petitioner, now serving a sentence of eight and one-third years to twenty years imposed under a judgment of conviction entered in February 1970 for robbery in the first degree[1] following a jury trial in the Supreme Court of the State of New York, seeks his release upon a writ of habeas corpus. He alleges that the pre-trial identification procedures used by the police at the time of arrest violated his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process of law.

Petitioner's judgment of conviction was affirmed by the Appellate Division, First Department, on February 25, 1971; leave to appeal was denied by the Court of Appeals on April 7, 1971. On December 15, 1971, petitioner's pro se application for a writ of habeas corpus was denied by this Court without a hearing. On January 21, 1972, this Court granted petitioner's application for a certificate of probable cause and for leave to proceed on appeal in forma pauperis,

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1. Petitioner was also convicted on related counts of grand larceny in the third degree, possession of a weapon and assault in the first degree. He was sentenced to concurrent lesser terms on these counts.

and appointed counsel to represent petitioner on appeal. On September 28, 1972 the Court of Appeals reversed the denial of the application, holding that petitioner was deprived of his Sixth Amendment right to counsel at a show-up conducted on the night of the arrest. U.S. ex rel Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973)(hereafter "468 F.2d at ___"). The matter was remanded for an evidentiary hearing on the question whether "...there was an impermissible taint to the in-court identification..." 468 F.2d at 165. This Court held an evidentiary hearing (hereafter "the Hearing") on May 29, 30 and June 11, 19, 20, 21, 1973.

After careful scrutiny of the testimony adduced at the Hearing and the papers submitted in conjunction therewith, we conclude that the application is devoid of merit and must be denied.

I

The events which grounded the prosecution took place in broad daylight in Manhattan at 11:30 A.M. on May 3, 1968. Daniel Greenberg had just obtained a blue airline bag of coins totalling some $80 from the Manufacturers Hanover Trust Company at 8th Avenue and 44th Street in Manhattan and

was returning to his parking lot on West 46th Street when he was shot in the back by an assailant who picked up the bag with the money. At the trial, one eyewitness, an engineer named Schumam observed the assailant hold the gun, grab the bag and run to and enter a small white car. Another passer-by, Barcelo then testified he observed a white Mercury Cougar stop at the intersection of 8th Avenue and 46th Street. A "commotion" followed on the street whereupon Barcelo observed a man enter the Cougar which was then stopped on the northeast corner of 8th Avenue across 46th Street. Neither Schumann nor Barcelo identified petitioner at trial. See 468 F.2d at 161.

The only witness who identified petitioner at trial was Patrolman Ferdinand Voltaggio, a police officer assigned to the Parking Enforcement Squad. At the moment of the crime, Voltaggio was in a tow truck stopped at the 46th Street stop light on 8th Avenue in the furthest west traffic lane. Voltaggio testified that when he heard the shot, he looked to his left (Tr. 12)[2] in the direction from where the sound

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2. "Tr." followed by a number refers to a page of the transcript of the evidentiary hearing held before this Court.

of the shot came and saw the assailant standing over Greenberg's body. At that moment the assailant was some 50 feet from Voltaggio who was able to look at him full face (Tr. 559). The assailant thereupon picked up the bag and ran to the opposite corner of 46th Street. When he reached that corner, he had traversed a distance of 50 feet and was then within 25 feet of Voltaggio who remained in his tow truck (Tr. 559-561). The assailant was then directly across the street from the truck. Voltaggio's attention thereupon was momentarily distracted by the honking of horns. When Voltaggio refoucused upon the assailant, he was still at the opposite corner of 46th Street, some 25 feet from Voltaggio, waiting to cross 8th Avenue (Tr. 559-561; 566). The assailant then traversed another 50 feet as he crossed 8th Avenue; jumped into the Cougar, occupied by two men, and drove north on 8th Avenue.

Voltaggio pursued the Cougar in his tow truck, both vehicles going through red lights at Broadway and 7th Avenue. The Cougar became enmeshed in traffic at 6th Avenue, whereupon the assailant jumped from the car and fled towards 6th Avenue. Voltaggio, whose tow truck was several car lengths behind the Cougar, jumped from his truck and from a distance of 30 to 40 feet (Tr. 573) observed the assailant fleeing. Voltaggio was again able to view the assailant's face as he

emerged from the Cougar. He did not pursue the assailant who escaped, but apprehended the two men remaining in the Cougar, the Pyles brothers.

The testimony is in conflict as to the length of the various periods during which Voltaggio viewed the assailant. Voltaggio testified at the State trial that he viewed the assailant's face for about 14 seconds as he ran across 8th Avenue in front of the tow truck. The Court of Appeals reduced this to approximately four seconds, taking judicial notice "that a man running only 10 miles per hour, half the speed of a sprinter, can cover about 15 feet per second." 468 F.2d at 162. See also 463 F.2d at 164. However, the testimony adduced at the Hearing indicates strongly that while Voltaggio did not have as much as 14 seconds to observe the assailant, he did have more than four. He observed the assailant twice traverse a distance of 50 feet; the first time when he ran in front of the tow truck to the opposite corner of 46th Street, at which point Voltaggio's attention was momentarily diverted by the noise of traffic, and then another 50 feet as the assailant crossed 8th Avenue and jumped into the Cougar. Moreover, Voltaggio testified that in the interim between these two distances, the assailant stood still for "a couple of seconds" (Tr. 566), probably waiting for an opportunity to cross the Avenue. Relying upon this testimony

and using the method of calculation suggested by the Court of Appeals, it appears that Voltaggio's opportunity to observe the assailant lasted between 7 and 10 seconds, and we so find.

Voltaggio further testified before us that he searched the Cougar and found the blue airline bag carried by Greenberg and a Hertz rental agreement which included a notation that the car had been rented the day before by petitioner and bore his home address.

II

Voltaggio thereupon brought the Pyles brothers to the 18th Precinct where their arrest was processed by Detective Matthew Horan. Voltaggio gave the Hertz agreement to Horan as well as a description of the escaped assailant. Acting upon that description, Horan sent out a police alarm which described the assailant as an "unknown male Negro, 25 years old, 5'-7", 150 lbs, brown complexion, dark shirt and jacket, dark pants" (Tr. 72-76; 188; 310-313). Horan testified at the Hearing that the alarm included everything that Voltaggio gave him regarding the assailant (Tr. 188).

On the night of the crime, Horan, acting upon the name and address contained in the Hertz agreement, went to

petitioner's home where he found Odessa Chambers, petitioner's girl friend and later his wife, and brought her to the station house. A hearing on an application for a complaint and warrant was held. There and then Horan, Chambers and Voltaggio testified in the presence of each other (HM 2-15A).[3] On that occasion Horan testified as to the events surrounding the robbery, that he had a description of the assailant obtained from Voltaggio and that based upon the information then available he concluded that petitioner was the assailant. Chambers testified next, describing petitioner as being 4 or 5 inches taller than her own 5 feet 2 inches, that he was "brown skinned" and when last seen was wearing a black suit with blue tie and light shirt, black shoes and no hat, but that he could have been wearing a "light colored pair of pants, too." See 468 F.2d at 162. Voltaggio then testified as to what he had seen. He described the assailant as a "brown skinned Negro, he was about 5-7 or 5-8, he had a dark jacket and ... light pants" and no hat. See 468 F.2d at 162. Upon the strength of that total testimony a complaint and arrest warrant were issued, charging petitioner inter alia with robbery and assault.

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3. "HM" followed by a number refers to a page of the minutes of the Warrant Hearing. Those minutes, dated May 3, 1968, were introduced into evidence at the Hearing before us as Exhibit 8.

III

On the evening of the day after the crime, Horan arrested petitioner at his home and brought him back to the 18th Precinct in Manhattan where he was booked. Horan summoned Voltaggio to the precinct a few hours later for the purpose of identifying the assailant. Horan met Voltaggio at the entrance to the squad room where petitioner was seated at a desk. A brief conversation ensued wherein Horan asked Voltaggio, "Freddie, is this the perpetrator," to which Voltaggio responded, "Yes, that's him" (Tr. 108; 230; 345).[4]

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4. There is some discrepancy as to the exact wording of Horan's question. At a meeting with the Assistant Attorney General representing the State at the Hearing, held on October 18, 1972, Voltaggio stated that Horan met him when he first entered the precinct and said, "Come upstairs... we have a fellow I would like you to see. I would like you to see if this is the fellow who did the shooting" (Tr. 115). Moreover, Voltaggio testified that he, Horan and petitioner were the only people in the room (Tr. 122) whereas Horan testified that two other white detectives were also present. (Tr. 230; 358-359). Finally, it should be noted that Voltaggio told the Assistant Attorney General at their October meeting that he had identified petitioner from a line-up and not from a show-up (Tr. 113-116). At the hearing, however, Voltaggio recanted his statements regarding a line-up (Tr. 116) explaining that he had confused the events of that evening with another identification procedure wherein a line-up was in fact used some two weeks earlier (Tr. 118).

Petitioner's version of what happened in the squad room differs significantly from that offered by Voltaggio and Horan. Petitioner claims that he was twice displayed before a one-way mirror by the police in a room other than the squad room (Tr. 412-423) and that only thereafter did Voltaggio enter the squad room and speak to Horan (Tr. 424-426). Petitioner claims that his version is corroborated by the fact that he was able to draw a diagram of the mirror room which he prepared prior to the Hearing in the presence of his counsel (Tr. 412-413; 430-434) and which by Horan's own admission was an accurate description of the room in which the one-way mirror was located in May, 1968 (Tr. 267-269). Petitioner contends that had he not been brought into the mirror room, he would have been unable to draw an accurate diagram of that room. Moreover, as the Court of Appeals noted, use of a mirror suggests a degree of uncertainty about Voltaggio's identification; this would be consistent with the fact that Horan showed Voltaggio a photograph of petitioner at his arraignment, the necessity for which does not otherwise appear (STM. 198-199).[5] See 468 F.2d at 164, 163 n.7.[6]

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5. "STM." followed by a number refers to a page of the State Court Trial minutes. Pursuant to stipulation, the trial minutes are a part of the record before this Court.

6. It should be noted that at the Hearing Voltaggio testified that he was not shown any photographs

After careful scrutiny of the testimony relevant to this issue, we conclude that petitioner's version of the show-up must be rejected. Whether or not a mirror was used is a fact of paramount significance, particularly in light of the extensive use thereof suggested by petitioner, one which no knowledgeable participant would be likely to forget. Horan and Voltaggio are of one mind that no mirror was used during the show-up and that Voltaggio's identification of petitioner was immediate and without any uncertainty. As to these issues, there is neither contradiction nor hesitancy. Though there are inconsistencies in Voltaggio's testimony regarding other details of the pre-trial procedure, they are typical of human frailties consistent with an honest witness whose candor and effort at recollection were clear and undeniable. From our vantage point, this witness scored high.

Footnote 6 cont'd

at the arraignment; that Horan did show him two photographs at a hearing conducted at St. Vincent's Hospital several months after the arraignment (Tr. 37-39; 120; 126-131). This testimony was erroneous, for Horan was not present at the hospital hearing (Tr. 356-357) and therefore could not possibly have exhibited photographs of petitioner to Voltaggio on that occasion.

Moreover the Hearing was held some five years after petitioner's arrest and even the State trial did not commence until more than 21 months after the shooting. Testimonial inconsistencies regarding these events are inevitable after such a lapse of time and they cannot be relied upon to challenge the testimony of Voltaggio and Horan regarding use of a mirror, as to which, we emphasize, there was neither uncertainty nor contradiction. Whereas neither Voltaggio nor Horan had any motive to falsify regarding use of a mirror, petitioner must have been aware that if he could establish its use at the show-up, his case would be greatly strengthened. As to his knowledge of the layout of the so-called morror room, it could as easily have been derived from his passing through the room or even his being seated therein at a time other than that during which he was identified by Voltaggio. There is nothing before us to the contrary. Accordingly, we find no persuasive reason to accept the diagram as proof that Voltaggio observed petitioner through a mirror before identifying him as the assailant.

Petitioner's testimonial expression was in marked contrast to that of Voltaggio; a certain shrewdness and cunning substituted for candor. His demeanor as a witness was suggestive of meticulous preparation and rehearsal prior to trial and his testimony smacked too much of a prepared and expected call

of triumph, "Now I got you!" In the main, it is clear that petitioner took great liberties with the truth; he was not convincing and we find ourselves duty bound to reject his testimony..

In the last analysis, in the pursuit of truth we are confronted here with a frequent setting -- written or documentary proof totally absent, we are compelled to extract and weigh, from the totality of oral proof, the fragments as well as large segments of evidence bearing upon the factual issues for resolution, and to employ, among other factors, a discerning eye in "sizing up" each witness. We strictly apply to ourselves the same criteria and cautions about the testimony of witnesses that we include in our charge to juries:

> The greatest challenge to you is your evaluation of the testimony as it came from the lips of witnesses and your estimate of the exhibits and the stipulations. It is your total evaluation of the testimony given by the witnesses, and each of them, that is controlling, not that advanced by the attorneys or suggested by anybody. You are the sole judges of the facts and you have no greater burden than the accurate recognition of what really counts in the totality of that testimony.
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> In examining the witnesses who took the stand, in sizing them up, in your search for the truth, you should be guided by your plain every day common sense. You saw each witness, you observed the manner of his giving testimony. What degree of credit you should give a witness' testimony should be determined by his conduct, his manner of testifying, his relation to the controversy, his bias or impartiality, and the reasonableness of his statements.

> In other words, what you try to do, to use the vernacular, is to size up a person, just as you would in any important personal matter when you undertake to determine whether or not a person is truthful, candid and straightforward.
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> The testimony of any witness whose self-interest is regarded convincing to you is to be considered with great caution and weighed with great care. Accordingly, you will consider whether the testimony was inspired by self-interest, personal advantage, hostility or whatever other human factors may be involved. You should consider whether the testimony of such a witness was a fabrication induced by a promise or even a belief that he did or will receive favorable consideration of one kind or another. Likewise, it is for you to decide whether a defendant's testimony points to his innocence or is in part or in whole a tissue of lies.
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> You should consider the witness' intelligence, motive, state of mind and demeanor while on the stand. You should consider his candor, or lack of candor, his possible bias, his means of information, and the accuracy of his recollection.
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> You have heard a number of versions of events which are in sharp conflict. Indeed, it is evident that the nature of the contradictions suggests that the differing versions are not always the result of inadvertence or faulty recollection.
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> Truth comes from the most unlikely sources. Those from whom we rightfully expect the truth, very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushes forth.
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> Thus, out of the welter of testimony, you are called upon to determine the factual issues in the case and resolve the conflict.

Carefully applying this measurement, we are satisfied by a fair preponderance of the credible evidence that the truth lies with Voltaggio and not with petitioner. We find Voltaggio a simple

man, with a simple vocabulary, with respect for truth, whereas there was patently absent in petitioner's testimony the ring of truth.

We also bear in mind another part of our charge to juries:

> I instruct you that it is the law that interest creates a motive to give false testimony, that the greater the interest, the stronger the temptation, and that the interest of a defendant in the result of a trial is of a character possessed by no other witness and is therefore a matter which may affect the credence which shall be given of his testimony.
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> However, let me point out that the fact a defendant has such an interest in the case does not mean that he will testify falsely. It is for you, the jury, to decide whether he testified truthfully and how much weight to give to his testimony.

Clearly, of all the witnesses called petitioner has the greatest interest in the outcome of this proceeding.

Petitioner was arraigned on May 5, 1968 (Tr. 354-355). Voltaggio testified at the Hearing that he was not present at the arraignment. (Tr. 124). At the state trial, however, Voltaggio stated that he was present at the arraignment and there viewed petitioner in the custody of Horan

(S.T.M. 192-3; 324). Moreover both Horan and petitioner testified at the Hearing that Voltaggio was in fact present (Tr. 355; 438-441). As stated above, it was at the arraignment that Horan showed petitioner's photograph to Voltaggio. No reason for Voltaggio's presence at the arraignment is apparent from the record, and Voltaggio could offer none when asked (S.T.M. 192). See 468 F.2d 164, 163 n.3. While we entertain uncertainty on this point, we are satisfied that at most Voltaggio may have been honestly mistaken about it.

IV

The issue before us is whether the pre-trial identification process set forth above should have precluded Voltaggio's in-court identification of petitioner. Whereas here the illegality of the pre-trial identification procedure is already established because petitioner was deprived of his right to counsel, the State bears the burden of establishing by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than during pre-trial identification procedures; that the in-court identification had an independent origin and was not tainted by the prior illegal procedures. U.S. v. Wade, 388 U.S. 218, 240-41 (1967). See Cooper v. Picard, 428 F.2d 1351, 1353-54 (1st Cir. 1970), on remand, 316 F.Supp. 856 (D. Mass. 1970); U.S. v. Zeiler, 427 F.2d 1305, 1309 (3rd Cir. 1970). The proper test to be applied is:

> "'[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

U.S. v. Wade, supra at 241. See Wong Sun v. U.S., 371 U.S. 471, 488 (1963). In applying this test, the Court has set forth several factors which must be considered, including the following: (1) "prior opportunity to observe the alleged

criminal act"; (2) "the existence of any discrepancy between any pre-lineup [or show-up] description and the defendant's actual description"; (3) "identification prior to lineup [or show-up] of another person"; (4) "the identification by picture of the defendant, prior to the line-up [or show-up]"; (5) "failure to identify the defendant on a prior occasion"; (6) "the lapse of time between the alleged act and the line-up [or show-up] identification"; (7) "those facts which, despite the absence of counsel, are disclosed concerning the conduct of the line-up [or show-up]". U.S. v. Wade, supra at 241. It should be noted, however, that this list is not exhaustive and, in the context of the instant proceedings, there are other factors which must be considered such as "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification." U.S. v. Wade, supra at 228. Hence the nature of the police station confrontation must be considered in reaching a conclusion as to independence of recollection of a witness subject to it.[7] See Cooper v. Picard, supra at 1354. Cf. Clemons

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7. A somewhat similar list of criteria which we found helpful is the following:

> 1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion

v. U.S., 408 F.2d 1230, 1244-46 (D.C. Cir. 1968)(en banc), cert. denied, 394 U.S. 964 (1969).

Footnote 7 cont'd

that he was shown alone to the witness?

2. Where did the confrontation take place?

3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a line-up?

4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?

5. Were any tangible objects related to the offense placed before the witness that would encourage identification?

6. Was the witness' identification based on only part of the suspect's total personality?

7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing defendant?

8. Was the emotional state of the witness such as to preclude objective identification?

9. Were any statements made to the witness prior to the confrontation indicating to him that the police were sure of the suspect's guilt?

10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on a less than positive basis?

U.S. v. O'Connor, 282 F.Supp. 963, 965 (D.D.C. 1968) aff'd 420 F.2d 644 (D.C. Cir. 1969).

V

We turn first to a consideration of Voltaggio's opportunity to scrutinize the assailant at the time of the robbery. We were desirous of, and at all times encouraged, a meticulous, detailed, albeit repetitious, development of every moment within the period commencing when Voltaggio first beheld the assailant, at the instant of the firing, up to and including the assailant's disappearance after he emerged from the Cougar. We allowed free reign to counsel on both sides, and they responded fully and without restraint of any kind. Such an approach, if the truth is to emerge, becomes imperative. And it did, thus enabling us to arrive at the conclusions with which this writing deals.

While the total time during which Voltaggio was in a position to observe petitioner during the robbery could not have lasted more than seven to ten seconds, we find that in the context of this case it was sufficient. The visibility conditions were excellent and during that period petitioner came within 25 feet of Voltaggio. Moreover Voltaggio was able to observe petitioner again as he jumped from the Cougar and fled up Sixth Avenue. On this occasion, Voltaggio was only 30 to 40 feet from petitioner as he emerged from the Cougar (Tr. 20; 573), a distance sufficiently short to enable

Voltaggio to scrutinize once again the assailant's features and confirm in his mind the mental image developed seconds before at their confrontation at 46th Street and 8th Avenue. Tough of itself this later opportunity for observation -- it could have lasted no more than "2 to 3 seconds" (S.T.M. 196)[8] -- would hardly have been an adequate independent source, it afforded Voltaggio an opportunity to confirm or bolster his image of the assailant developed seconds before at 46th Street and 8th Avenue.

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8. It should be noted that Voltaggio was running up to the vehicle as the assailant was running from it (Tr. 573) and by his own testimony Voltaggio really saw the assailant only when he got out of the Cougar and started to run (Tr. 571-572). He also testified, however, that the man who ran out of the Cougar was the same person who crossed 8th Avenue (Tr. 17) and that the Cougar was never out of his sight during the interim (Tr. 570).

Petitioner contends, however, that Voltaggio's opportunity for visual observation was inadequate; that its inadequacy is demonstrated by the various inconsistencies in Voltaggio's testimony regarding that opportunity. Thus at the Hearing he testified that when the assailant reached the northwest corner of 46th Street and 8th Avenue, he remained "standing there" for "a couple of seconds" before crossing the avenue (Tr. 562-563; 566). At both the state trial as well as pre-trial warrant hearing, Voltaggio testified that the assailant ran across 8th Avenue and got into the Cougar without stopping at any point along the way (HM 13; S.T.M. 162-163; 183). Similarly, Voltaggio contradicted himself on several occasions as to the duration of his opportunity to observe the assailant. Thus Voltaggio initially testified that almost 30 second elapsed from the time he first observed the assailant until the latter entered the Cougar (Tr. 14). On cross-examination, however, he changed his testimony, stating that he observed the assailant for "approximately ten to fifteen seconds" (Tr. 172). When questioned by the Court, Voltaggio recanted this testimony and acknowledged that he could not recall or estimate the time that elapsed during that period (Tr. 562; 566-567).

This argument, however, ignores several critical factors. First, as we stated above, the Hearing was held more than five years after the incident in question. Even the brightest recollection in the keenest of minds would have dimmed substantially during that interval and petitioner cannot be allowed to gain advantage from the lapse of time between the crime with which he was charged and the hearing years later of his application for relief. Voltaggio did not impress us as a keen individual, one with sharp mental faculties; we so stated during the hearing. (Tr. 555). However, what was requisite in this instance was what the eye beheld, not what could be dredged from one's mental faculties. Recognition of a person or face is above all the product of a mental image which becomes fixed at the moment of confrontation. That the details of the time period of confrontation may fade with the passing of time is therefore not proof that the image when fixed was not accurate or reliable.

We must bear in mind that quite often an identification formed under conditions saturated with excitement is more impressive than an identification under uneventful circumstances. Voltaggio, we find, had the capacity to extract with certitude a mental image of the assailant.

The sworn witness' actual words constitute but one factor upon which we rely in our search for the truth. Unrecorded in the official transcript of the trial minutes are other extremely valuable aides. The voice and eyes (how often either or both betray the witness or fail to lend support to his words), the witness' gestures (natural, forced, simulated, etc.), and his general deportment while testifying. We look to these guides too and often find they are at least equally potent in the fulfillment of our mission to ascertain where truth lies, falsity exists, uncertainty prevails. We applied with extreme care each of these criteria and found Voltaggio's testimony firm and of convincing quality.

Though Voltaggio gave inconsistent testimony at the state trial and at the Hearing regarding some of the circumstances of the confrontation, he was on each occasion firm in his identification of petitioner. See Simmons v. U.S., 390 U.S. 377, 385 (1968); Gregory v. U.S., 410 F.2d 1016 (8th Cir. 1969), cert. denied, 396 U.S. 865 (1969); Clemons v. U.S., supra at 1241, 1246. While this factor may often be more probative of the obduracy of a witness than of the reliability of his identification, it is our judgment predicated upon the quality of Voltaggio's testimony before us that his identificatiom was reliable and without uncertainty.

Moreover, Voltaggio was not himself a victim of the robbery or shooting; the danger discussed in Wade that a victim's "understandable outrage may excite vengeful or spiteful motives" is consequently, absent. See U.S. v. Wade, supra at 230. On the contrary, Voltaggio was a trained police officer who upon observing the commission of a crime immediately concentrated his efforts upon apprehending the assailant and his accomplices. This must undoubtedly have included focusing upon the assailant's features for the purpose of making a subsequent identification. We therefore give greater weight to Voltaggio's testimony than we would were he an ordinary bystander or a victim of the crime.

VI

Frequently in our trials, either to the Court or jury, the total evidence on the affirmative of a hotly contested identification comes exclusively from the oral testimony of a single witness. Yet, time and time again, that issue is resolved affirmatively even where numerous discrepancies in the witness' total testimony are revealed during the course of a properly exhaustive and exhausting cross-examination, and despite the testimony of many witnesses to the contrary. We venture the opinion that the ultimatum was based almost exclusively upon the conviction with which the

witness rendered his testimony.

We conclude, therefore, that the Government produced clear and convincing evidence of a source for the in-court identification arising independently of the illegal confrontation.

VII

We do not, however, ignore the possibility that a highly suggestive station-house confrontation could have distorted the mental image Voltaggio originally formed at the scene of the crime. U.S. v. Wade, supra at 241. See Hawkins v. U.S., 420 F.2d 1306 (D.C. Cir. 1969); Williams v. U.S., 409 F.2d 471 (D.C. Cir. 1969); Clemons v. U.S., supra at 1250. A pre-trial procedure may be so suggestive that even a court-room identification would be a violation of due process for the reason that the in-court identification may be based upon a witness' visual observation during the illegal confrontation rather than at the scene of the crime. See e.g. Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973); U.S. v. Luck, 447 F.2d 1333 (6th Cir. 1971); U.S. v. Johnson, 461 F.2d 1165 (5th Cir. 1972). As stated in Hawkins v. U.S., supra at 1307-08, the burden of establishing that an in-court identification of an accused is based upon observations other than at the illegal confrontation requires "considerably more than a showing

that the observations provided ample foundation upon which the witness, absent the illegal confrontation, could make an identification." See also U.S. v. Garner, 439 F.2d 525, 528 (D.C. Cir. 1970) cert. denied, 402 U.S. 930 (1971); U.S. v. Kempner, 433 F.2d 1153, 1159 n.5 (Bazelon, C.J., concurring).

The alleged suggestive elements are found in three events: the warrant hearing on the evening of May 3, the stationhouse identification on the evening of May 4 and petitioner's arraignment on the evening of May 5. The stationhouse confrontation and the arraignment are described in detail above. As for the warrant hearing, it is important to note that Voltaggio described the assailant only after he had heard the testimony of Horan and Chambers. Thus he first heard Horan's statement that he was sure petitioner was the assailant (Tr. 282). Indeed, Horan acknowledged that earlier that day he had advised Voltaggio of his determination concerning petitioner's guilt (Tr. 282). Moreover, Voltaggio was aware, on the basis of his own investigation, that the car in which he apprehended the Pyles brothers had been rented by petitioner the day before (Tr. 25; 57). Finally Voltaggio's description matched that just given by Chambers in his presence and contradicted his earlier description given to Horan that

afternoon regarding the color of the assailant's pants (HM 12; 14; Tr. 188). Accordingly, at the conclusion of the warrant hearing Voltaggio was aware that a warrant had been issued for petitioner's arrest on the basis of his description as well as the fact that his name was on the Hertz rental agreement.

It is clear that there were improper elements of suggestion in the aforementioned pre-trial procedure. Inasmuch as Voltaggio's description was to be a basis of the arrest warrant, he should not have been allowed to hear Chambers' description before giving his own. Thus in Monteiro v. Picard, 443 F.2d 311 (1st Cir. 1971) cert. denied, 404 U.S. 1041 (1972) in-court identifications by a robbery victim and one witness were held inadmissible on the ground that at a prior line-up the victim and witness were asked to express their choice only after hearing a positive identification by the victim's wife who had also been a victim of the robbery. The court characterized the wife as a strong personality and reasoned that her prior identification was likely to have made an impression on her aging husband and the witness. See J. Quinn, "In the Wake of Wade," 42 U. Colo. L. Rev. 135, 153 (1970). Similarly Horan should not have made Voltaggio privy to his conclusions regarding petitioner's guilt. There was no need for such "cooperation," well-intentioned though it

may have been; its only effect was to reinforce Voltaggio's own conclusion that petitioner was the assailant. That an eyewitness is a policeman is no reason for investigating authorities to treat him and differently from any ordinary eyewitness even though his testimony may be given greater weight because of his training and expertise.

However, we find the conduct of the warrant hearing in no way created a "substantial likelihood of irreparable misidentification" at the show-up or subsequently at trial. Simmons v. U.S., supra at 384. See Neil v. Biggers, 409 U.S. 188, 198-199 (1972). No identification was made at the warrant hearing and in this respect Monteiro v. Picard, supra, is distinguishable. Moreover, the show-up was conducted only 36 hours after the crime. Accordingly, in light of Voltaggio's opportunity to scrutinize the assailant at the scene of the crime on the preceding day, we are not persuaded that the identification at the show-up or the subsequent trial was based upon his having heard the testimony of Chambers or Horan. Monteiro v. Picard, supra, is further distinguishable on this ground for there the court found that the excluded identifications were not based on a source independent of the jail line-up. 443 F.2d at 313 n.3.

The conduct of the show-up and showing of a photograph at the arraignment, though also unnecessarily suggestive, did not, we find, create a substantial likelihood of irreparable misidentification. Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are highly suggestive. Regardless of what the police actually say to the viewer, it is inevitably apparent to him that they think they have caught the villain. Here, however, Voltaggio's exposure to petitioner at the stationhouse lasted less than a minute; he identified petitioner immediately upon looking at his face. We find no reason to suspect that the mental image formed by Voltaggio then was in any way different from that formed at the scene of the crime or in any way distorted or supplanted it. We see therefore no reason to conclude other than that Voltaggio was able to identify petitioner through his encounter at the crime rather than at the police station. Thus in U.S. ex rel Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970), cert. denied, 400 U.S. 908 (1970) the Second Circuit permitted an in-court identification to stand despite its finding that the post-arrest show-up in which an eyewitness to a robbery identified the robbers was impermissibly suggestive. In an opinion which has become seminal in this Circuit regarding the admissibility of in-court identification testimony, the Court held that the opportunity for the eyewitness to observe the robbers while he struggled with them for some 20

to 30 seconds was sufficient to overcome the taint of the show-up.

Among the factors considered by the court were the motivation of the witness to observe the robbers, the speed and certainty of identification at the first exposure and the short lapse of time between the crime and the illegal confrontation. All these factors are applicable to the case at bar and are equally supportive of our conclusion that Voltaggio's in-court identification was admissible. Indeed the circumstances of that case are more questionable than our own for there the witness testified at a pre-trial hearing that the in-court identification was based on his prior exposures to the robbers and on the illegal show-up as well. See 428 F.2d, supra, at 913. Similarly in U.S. v. Mooney, 417 F.2d 936 (8th Cir. 1969), cert. denied, 397 U.S. 1029 (1970), the Court upheld admission of testimony as to a pre-trial photographic identification as well as one made when the appellant was pointed out to the witness in the court hallway just prior to the opening of trial. The court reasoned that the identifications, both pre-trial as well as in-court, were based upon fifteen seconds' observation of the defendant on a television screen as he sought to cash a stolen check.

> "[A] fifteen-second look is substantially more than a fleeting glance. We deem it sufficient time for one whose business it

> is to identify persons presenting checks for payment, to have retained in his memory the resemblance of the person he so observed. Clearly any objection could only go to the weight of the testimony not its admissibility, and the weight was for the jury's determination."

417 F.2d at 939. See also U.S. ex rel Cummings v. Zelker, 455 F.2d 714 (2d Cir. 1972), cert. denied, 406 U.S. 927 (1972); U.S. v. Famulari, 447 F.2d 1377 (2d Cir. 1971).

The use of a photograph at the arraignment avails petitioner hardly anything. The arraignment was one day after the show-up. Accordingly, seeing the photograph actually did not prompt the identification at that time. Because the arraignment was only two days after the robbery, yet some 21 months before commencement of the trial, it is highly unlikely that the photograph might have supplanted or distorted Voltaggio's original image of the assailant. There is no suggestion in the record that the showing of the photograph was motivated by any uncertainty on the part of Voltaggio or that he studied it for the purpose of improving his recollection. Inasmuch as no reasonable basis is apparent, we are unwilling to attribute such a motive to Horan or Voltaggio. In all probability Horan showed Voltaggio the photograph as a fellow officer in order to make him privy to the ongoing investigation, thinking that the identification procedure had already been completed. While, as we have already stated,

Voltaggio should not have been made a participant in the investigation, his forced participation, whether with respect to Horan's conclusions as to petitioner's guilt or the use of the photograph, is not grounds for rendering his identification inadmissible. As stated in U.S. v. Sutherland, 428 F.2d 1152, 1156 (5th Cir. 1970) cert. denied, 409 U.S. 1078 (1972), regarding an identification by a bank teller who had previously been shown the defendant's photograph:

> ...if a teller in a bank is held up by a person he knows well, a picture spread, regardless of its suggestiveness, is unlikely to affect the teller's identification. But if the witness caught only a fleeting glimpse of an unknown fleeing felon, the likelihood of misidentification is substantially increased by a suggestive picture spread. Between these two extremes, the determination must be made upon the facts in the particular case.

In the instant case the record is clear that Voltaggio's identification was unwavering and based upon adequate visual observation at the scene of the crime. In light of these factors as well as those already set forth above, we conclude that seeing the photograph did not taint Voltaggio's in-court identification.

VIII

The cases upon which petitioner relies are inapposite. Thus in Foster v. California, 394 U.S. 440 (1969), the only Supreme Court decision that has ruled out an in-court identification on the basis of impermissible taint, the witness, after seeing the defendant in a suggestive line-up followed by a face-to-face confrontation, still could not be sure that the defendant was the right man and became convinced only after another misleading line-up several days later. The Court considered it incredible that a witness who had been through this experience could make an in-court identification free from the taint of what had gone before. U.S. ex rel Phipps v. Follette, supra at 916. Similarly in U.S. v. Gambrill, 449 F.2d 1148 (D.C. Cir. 1971) where an in-court identification was precluded because of a prior impermissibly suggestive photographic display, the witness had been unsure of her identification even when shown photographs of the defendant -- photographs shown her because she theretofore had been unable to make a positive identification. Moreover, the witness had a restricted opportunity to observe the defendant at the scene of the crime and her description was limited and lacking in any distinctive features. See also U.S. v. Johnson, supra; Mason v. U.S., 414 F.2d 1176 (D.C. Cir. 1969) where in addition to the absence of an independent basis the Court

found that the witness, a bank teller, was under strong psychological pressure to make an identification. Similarly in both Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971) and U.S. v. Fowler, 439 F.2d 133 (9th Cir. 1971), where pre-trial photographic displays were found to have created a substantial likelihood of irreparable misidentification, the record is barren of any independent basis for the in-court identification. In Kimbrough, the pre-trial identifications were made on the basis of photographs of defendant provided to the police by his estranged wife two weeks after the crime as a means of avenging her recent conviction for cohabitation. Defendand had not been linked to the crime until the police received the photographs, and at trial the only evidence offered was the identifications. The Court reasoned that the lapse of time between the crime and the identification, coupled with the unusual way in which the police focused upon the defendant, created a substantial likelihood of misidentification. Kimbrough v. Cox, supra at 10. No such circumstances are apparent in the facts of the case before us.

Finally we consider the case of Cooper v. Picard, supra, where an in-court identification was held inadmissible because it had been preceded by an unduly suggestive police line-up and an independent basis could not be established. In that case a husband and wife, victims of a robbery, were

unable to accurately describe the robber despite having been within 3 to 20 feet of him for up to 5 minutes. They described the robber as about 20-21 years old, 5 feet 9 inches tall with blond hair. The defendant was in fact 27 years old, 5 feet 10 inches, dark hair, pock marks, sunken cheeks and a sallow complexion. Petitioner contends that the description given by Voltaggio was equally inaccurate and lacking in detail and therefore we should adopt a similar conclusion.

There are indeed discrepancies in the various descriptions of petitioner given by Voltaggio. Thus on the afternoon of the crime and at the warrant hearing Voltaggio described the assailant as brown or dark complexioned (Tr. 188; HM 14). At the trial and Hearing, however, he described him as "light skinned" (S.T.M. 149; Tr. 141). Similarly, Voltaggio originally described the assailant as wearing dark pants (Tr. 188), but at the warrant hearing said he wore "light pants" (HM 14). Such discrepancies, however, fail to give rise to any substantial doubt as to whether the image that Voltaggio retained from his observations at the scene of the crime was sufficiently and positively accurate as to form an independent basis for his subsequent identification. As was stated in Russell v. U.S., 408 F.2d 1280, 1284 (D.C. Cir. 1969), cert. denied, 395 U.S. 928 (1969):

> "[R]ecognition of a person or face would seem to be as much the product of a subjective mental image as of articulable, consciously remembered characteristics. A man may see clearly in his "mind's eye" a face or a figure which he is hard put to describe adequately in words."

The inconsistencies in Voltaggio's descriptions with respect to the color of the assailant's pants and whether he was a light skinned or brown skinned Negro do not reflect upon the basic mental image which was the source of the identification. In this respect Cooper v. Picard, supra, is distinguishable for there the discrepancies demonstrated that the witnesses had not formed a definite mental image of the assailant. Indeed their description was wholly inaccurate and the wife was unable to give any description of the robber.

Here, however, the fact that at the trial -- some 21 months after the crime -- Voltaggio thought the assailant was a "light skinned" as opposed to "brown skinned" Negro cannot reasonably be said to reflect upon whether the in-court identification was derived from a source independent of the illegal show-up. Indeed, this particular feature is so subjective that even with the image of the assailant vividly in mind one would not know whether to describe his skin, unmistakably Negroid, as light or brown. We feel compelled to add that Voltaggio's vocabulary was markedly sparse.

As for the discrepancy in the description of the assailant's pants, even if Voltaggio were influenced by Chambers' testimony at the warrant hearing, we are not impressed that their color, whatever it may have been, was a basis for the in-court identification. Moreover, the descriptions given by Chambers and Voltaggio matched in all other respects and did not otherwise contradict Voltaggio's earlier description given on the afternoon of the crime before he heard Chambers' testimony. That description was accurate and sufficiently detailed to demonstrate that Voltaggio's in-court identification was based upon his observations at the scene of the crime and was not derived from the confrontation at the show-up.

IX

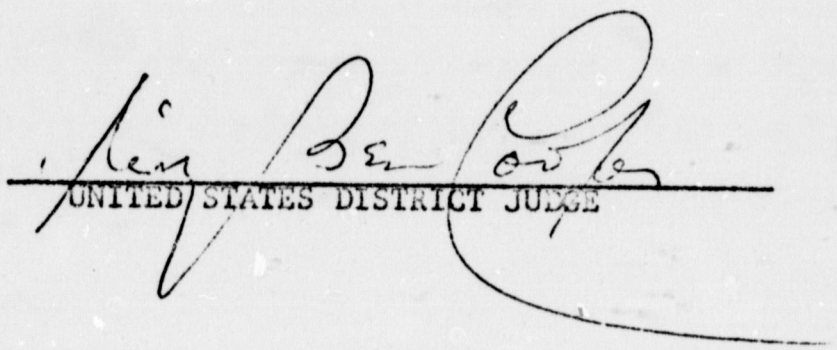
We would be remiss if we failed to express to Stephen Marshall, Esq. our appreciation for a job very well done. We appointed him January 21, 1972, shortly after petitioner first made his appearance before us. At all times, lastly his careful and thorough post-hearing memorandum, his advocacy was of high order, indeed. Petitioner was well-served.

X

Accordingly, on the facts and on the law we find that there was no "impermissible taint to the in-court identification." Petitioner's application for a writ of habeas corpus is therefore denied in all respects.

SO ORDERED:

New York, N.Y.
January 31, 1974



UNITED STATES DISTRICT JUDGE

74-1294

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.A. ex rel. CARL M. ROBINSON,

PETITIONER,

-v-

JOHN J. ZELKER

RESPONDENT.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 71 civ. 1997

JUDGE COOPER

PG. 1

INDEX TO THE RECORD ON APPEAL

	DOCUMENTS
Certified copy of docket entries	A-C.
Petition for a writ of habeas corpus (with exhibits A-E annexed); affidavit for leave to proceed in forma pauperis; affidavit of service; notice of motion.	1.
Supplemental motion for a free copy of state trial transcript. affidavit in support thereof. Memo. of law in support of supplemental motion.	2.
Memo. of law in support of petition for a writ of habeas corpus.	3.
order dtd"May 5-71" permitting petitioner to proceed in forma pauperis- McGohey J.	4.
Order dtd"May 28-71" extending respondent's time to answer or move (McGohey J.); affidavit of Assist. Atty General annexed.	5.
Order dtd"June 21-71" extending respondent's time to answer or move (Bonsal J.); affidavit of Assit. Atty. General annexed.	6.
Notice dtd"July 22-71" assigning case to Judge Cooper pursuant to Rule 2(c) of the General Rules of the District Ct.	7.
Affidavit of Assist. Atty General in opposition to petition.	8.
Petitioner's reply and traverse to respondent's return; motion for appointment of counsel.	9.
Letter dtd"July 9-71" from petitioner to Pro Se Clerk.	10.
Notice and affidavit respecting change of proper party respondent; affidavits in support of transfer.	11.
* Memo. decision dtd"Dec. 15-71" denying petition -Cooper J.	12.
Petitioner's affidavit in support of motion for leave to proceed in forma pauperis and for appointment of counsel; motion for certificate of probable cause with affidavit in support thereof; motion for composition of record on appeal.	13.
Petitioner's alternative motion and affidavit, sworn to Jan. 7-72, in conjunction with application for certificate of probable cause.	14.
Order dtd"Jan. 21-72" granting petitioner's application (a) for a certificate of probable cause' (b) for the appointment of counsel; and (c) to proceed in forma pauperis; order appoints S. Marshall, Esq. to represent petitioner on his appeal.	15.

UNITED STATES COURT OF APPEALS
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JUDGE COOPER

INDEX TO THE RECORD ON APPEAL

DOCUMENTS

~~Certified copy of docket entries~~

Filed: Feb 28-74

74-1294

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Cooper JUDGE COOPER

JUDGE ...

Jury demand date:

74 CV. 199

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel. CARL N. ROBINSON, PETITIONER, -v- J. P. CONBOY, SUPT. OF GREAT MEADOW CORRECTIONAL FACILITY, COMSTOCK, N.Y., RESPONDENT.	For plaintiff: CARL N. ROBINSON Box 51 Comstock N.Y. 12821 For defendant:

UNITED STATES COURT OF APPEALS FILED MAR 29 1974 SAMUEL JOSEPH MACK CLERK

STATISTICAL RECORD	COSTS		DATE	NAME OF RECEIPT NO.	REC.	DISP.
J.S. 5 mailed x	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Petn. for writ of habeas corpus.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

1282-1174 1994

ONLY COPY AVAILABLE

U.S.A. ex.rel Carl M. Robinson vs. Warden Great Meadow Prison

JUDGE COOPER 71 CIV. 199

DATE	PROCEEDINGS	Date Judge
May 5-71	Filed petition for writ of habeas corpus.	
May 5-71	Filed Order granting the filing thereof without prepayment of fees. McGohey J.	
May 21-71	Filed Order that the time to Answer the complaint is extended to 6-21-71 McGohey, J.	
Jun 21-71	Filed Order extending time to answer petition to 6/28/71. Bonsal, J.(mailed notice).	
Jun.28-71	Filed Maryellen Weinberg, Affdvt. for defts' in opposition to petitioner's application for a writ of habeas corpus.	
Dec.15-71	Filed Reply and Traverse to Respondent's Return.	
Dec.15-71	Filed Amendment and Notice of Change respecting the proper party respt.	
Dec.15-71	Filed MEMO.END. Motion denied in all respects. So ordered. Cooper, J. (mailed notice).	
Jan 21/72	Filed Affidavit to support for leave to proceed in forma pauperis.	
Jan 21/72	Filed Notice of Motion for a certificate of Probable cause.	
Jan 21/72	Filed Affidavit in support of Motion for a certificate of Probable Cause.	
Jan 21/72	Filed Motion for composition of Record on appeal. We grant petitioner's	
Jan 21/72	Filed Memo. End. on Petitioner's application (a) for a certificate of probable cause(b) for appointment of counsel to prosecute this appeal and (c) to proceed in forma pauperis. We appoint Stephen A. Marshall, 598 Madison Ave.,NY. to represent petitioner in this ~~px~~ proceeding. So OrderedXW Cooper J. (mailed notice)	
Jan.25-72	Filed Notice of Appeal by Carl M. Robinson (mailed copy)	
Feb 29/72	Filed Alternative Motion in conjunction with application for certificate of probable cause.etc.	
Mar.2-72	Filed Certified Record on appeal to the U.S.C.A.	
Apr.23-73	Filed true copy of MANDATE of the U.S.C.A. with opinion attached. Ordered that the order of the District Court is reversed, and the action remanded to the said District Court for further proceedings in accordance with the opinion. Pusaro, Clerk. (mailed notice).	
May 8.73	Filed Order. Ordered Hearing shall commence on 5/23/73 at 2:15 p.m. in courtroom 1305;Petitioner's application be furnished with a copy of transcript of hearing at gov't expense is granted;Petitioner's assigned counsel request to bring petitioner for hearing is granted,etc. Cooper J. (M/N)	
May 8.73	Filed Order. Ordered hearing shall commence on 5/23/73;Etc. Cooper J. (M/N)	
May 24.73	Filed Order. Ordered that Stephen A. Marshall of 598 Madison Avenue.NYC 10022 is hereby added to the Panel of Attys.etc. & copy shall be filed with the ~~xtkz~~ clerk of the court of appeals,2nd circuit. Edelstein Ch. J. (M/N)	
May 30.73	Before Judge Cooper May 29,1973 thru May 30,1973 Hearing continued and adjourned Sine die.	
Jun 1.73	Filed Authorization to pay these expert or other service costs. So Ordered Cooper J.	
Jun 21.73	Before X Judge Cooper Hearing begun & Continued 5/29/73 & 5/30/73 & 6/11,19,20,21,73. Decision reserved.	
Jun 18.73	Filed Transcript of proceedings dated 5/29,30/73.	
Jul 13-73	Filed writ of habeas corpus with Marshal's return-Satisfied 6-21-73--Cooper,J.	
Aug 8-73	Filed Stip & Order that the time for Petitioner & Respondent to file their Post Hearing Memoranda is extended to 9/7/73. & the time for Petitioner & Respondent to reply is extended to 9/14/73. Cooper J.	
Jan 8-73	Filed CJA 20 Copy 2 approving payment to Court Reporters-dtd. 8-8-73 Cooper,J.	
Jan.31-74	Filed petitioner's post hearing memo.	
Jan.31-74	Filed respondent post hearing memo.	
Jan.31-74	Filed OPINION # 40307: *** Accordingly, on the facts and on the law we find that there was no "impermissible taint to the incourt identification." Petitioner's application for a W/H/C is therefore denied in all respects. So Ordered. COOPER,J. (n/m by Pro Se)	

Civil 1997 USA vs. Carl H. Robinson vs. Ward on Great Meadow Prison.

DATE	PROCEEDINGS
[illegible]	Filed Petitioner's Notice of Motion, &c. Proceed in Forma Pauperis on appeal. [illegible]
Feb 27.74	Filed Memo. & Ord. on motion dated 2/27/74. Motion for a certificate of probable cause & for leave to proceed in forma pauperis is granted. Petitioner's Atty. Stephen A. Marchal for relief as court appointed counsel is also granted. Connor J. (mailed notice)
Feb.28.74	Filed Notice of Appeal from order dated 1/31/74. (mailed notice)
[illegible]	Filed transcript of record of proceedings dated [illegible]
[illegible]	Filed transcript of record of proceedings dated [illegible]
[illegible]	Filed transcript of record of proceedings dated [illegible]
[illegible]	Filed transcript of record of proceedings dated [illegible]
[illegible]	Filed transcript of record of proceedings dated [illegible]
Feb 28.74	Filed petitioners Notice of Appeal from orderel dated 12/15/71 & 1/31/74. (mailed notice)
Mar. 7.74	Filed Memo. & Ord re Opinion #40707. Opinion & Order of 1/31/74 is amended as follows: p. 10, line 22; Add footnote 6A after the word "motion to trial. "Footnote 6A: Needless to add, his atty. of course had no part what ever in this, etc. Connor J. (mailed notice)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

D. C. 109 Criminal & Bankruptcy Continuation Sheet

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S.A. ex rel. CARL M. ROBINSON,
PETITIONER,

-v-

JOHN J. ZELKER,
RESPONDENT.

CASE NO. 71 cv. 1997

JUDGE COOPER

CLERK'S CERTIFICATE.

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- C, and the original filed papers numbered 1 thru 31, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED | PROCEEDINGS

NONE.

74-1321

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of MARCH, in the year of our Lord, One thousand nine hundred and seventy FOUR, and of the Independence of the United States the 198th year.

UNITED STATES COURT OF APPEALS
FILED
MAR 29 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Raymond F. Burghardt
Clerk of the Court.

I HEREBY ACKNOWLEDGE RECEIPT
OF THE CERTIFIED COPY OF DOCKET
ENTRIES, INDEX AND 600 (2)
VOLUMES OF ORIGINAL RECORD.

DATE: March 29, 1974

A. DANIEL FUSARO
CLERK, U.S.C.A. 2nd CIR.

by John Brascia
Asst Clerk

R/S 4-1 JB